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THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The human rights dimensions of population transfer, including the implantation of settlers

Preliminary report prepared by Mr. A.S. Al-Khasawneh and Mr. R. Hatano

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Introduction

1. In resolution 1990/17 of 30 August 1990, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, considering that mass population movements, particularly where induced or conducted by governmental authorities, invariably had had serious consequences for the enjoyment of human rights of the populations affected, decided to consider the matter, especially the human rights dimensions of population transfers, including the policy and practice of the implantation of settlers and settlements at its future sessions under the agenda item "The realization of economic, social and cultural rights".

2. In resolution 1991/28 of 29 August 1991, the Sub-Commission, noting that the implantation of settlers and the removal of people had received explicit attention in various country-specific resolutions that it had adopted in 1990 and previously, and noting with appreciation the country paper submitted by Ms. Christy E. Mbonu (E/CN.4/Sub.2/1991/47) on that subject, recognized that population transfers affected the basic human rights and freedoms of the peoples concerned, including the original inhabitants, the people removed and settlers and decided to include the question of the human rights dimensions of population transfers including the implantation of settlers and settlements, in its future work programme with a view to considering further effective action on that matter.

3. At its forty-fourth session, in resolution 1992/28 of 27 August 1992, adopted without a vote, the Sub-Commission entrusted Mr. Awn Shawkat Al-Khasawneh and Mr. Ribot Hatano as Special Rapporteurs with preparing a preliminary study on the human rights dimensions of population transfer, including the implantation of settlers and settlements, and requested them to examine, in the preliminary study, the policy and practice of population transfer, in the broadest sense, with a view to outlining the issues to be analysed in further reports, in particular the legal and human rights implications of population transfer and the application of existing human rights principles and instruments, and to submit the preliminary study to the Sub-Commission at its forty-fifth session.

4. At the same session Ms. Claire Palley submitted a preliminary working paper on the human rights dimensions of population transfer (E/CN.4/Sub.2/1992/WP.1).

5. The Commission on Human Rights, at its forty-ninth session, in decision 1993/104 of 4 March 1993, adopted by a vote of 48 to 1, endorsed Sub-Commission resolution 1992/28. At the same session, the Commission adopted resolution 1993/70 entitled "Human rights and mass exoduses", resolution 1993/77 entitled "Forced evictions" and resolution 1993/95 entitled "Internally displaced persons", which all have a direct bearing on the subject of population transfer.

6. The Economic and Social Council, by its decision 1993/... of ... approved Commission decision 1993/104.

7. The present document is the preliminary report on the human rights dimensions of population transfer, including the implantation of settlers and

settlements. The report describes the circumstances under which population transfers occur, as well as the cumulative effects. It lists the relevant international standards with major emphasis on humanitarian and human rights law, as well as relevant regional human rights instruments and bilateral population exchange agreements and treaties.

8. The report concludes by recommending approaches in this particular field, including potential remedies to address the problem.

9. The Special Rapporteurs would welcome comments on or suggestions concerning the preliminary report and seek the endorsement of the Sub-Commission of the preliminary recommendations which will enable them to continue along the lines suggested.

I. NATURE, EXTENT AND PREVALENCE OF POPULATION TRANSFER

10. As much as population transfer has prevailed as an instrument of State-craft in every age in recorded history, ours could be distinguished as the century of the displaced person. According to United Nations sources, the current number of registered refugees in the world approximates 18 million. 1/ However, displaced persons in other categories may equal an additional 20 to 24 million, 2/ while many others may simply go uncounted.

11. The Second World War demonstrated the full destructive potential that emerges from population transfers. However, post-war measures, including the promulgation of laws and international agreements, have not averted this continuing phenomenon. Rather, it has remained a common feature of the conduct of war, as well as peace-time policy. There is little doubt that dramatic population movements carry with them commensurate effects on both domestic and international relations of States. Given the volume of historical memory at our disposal, these effects are largely predictable, usually negative, and often a source of global instability and a threat to security. 3/

12. The effects of past population transfer policies involving the implantation of settlers have lingered to haunt newly emerging States, particularly in the former Soviet Union, where some 65 million former Soviet citizens live outside their republic of origin. 4/ Such consequences of the transfer and implantation of alien settlers now hamper the exercise of self-determination by peoples there. The failure of the international community to provide a lawful context in the Middle East has contributed to continued colonization of the self-determination unit of the Palestinian people and the denial of basic rights of the Kurdish people. This dynamic remains central to the volatile, often lethal situation besetting the region for the past half-century.

13. With reference to a classic case involving internal transfer that has mobilized international recrimination, the Secretary-General issued a public statement, in 1985, to protest "recurrent reports of arbitrary detention, banishment, [and] uprooting families" in South Africa. Four years later, he convened a meeting in Khartoum to devise measures to avoid further the starvation and death of "populations displaced or adversely affected" by conflict there. In addition to well-publicized cases of interethnic conflict,

some economic development processes have brought similar consequences of population transfer during peace-time. In recent years, the World Bank has thus become increasingly seized with the human right consequences of, and international protests against, its projects, which have displaced hundreds of thousands of powerless civilians.

14. Population transfer, known also by a number of synonyms, involves the movement of people as a consequence of political and/or economic processes in which the State Government or State-authorized agencies participate. These processes have a number of intended or unintended results that affect the human rights of the transferred population, as well as the inhabitants of an area into which settlers are transferred.

15. The term "transfer" implies purpose in the act of moving a population; however, it is not necessary that a destination be predefined. The State's role in population transfer may be active or passive, but nonetheless contributes to the systematic, coercive and deliberate nature of the movement of population into or out of an area. Thus, an element of official force, coercion or malign neglect is present in the State practice or policy. The State's role may involve financial subsidies, planning, public information, military action, recruitment of settlers, legislation or other judicial action, and even the administration of justice.

16. For millennia such transfers have been the experience of governments and society, and the human rights consequences may have been similar whether resettlement was caused by military action, political upheaval or by some sort of natural disaster. The main focus of this report is the general issue of the ongoing, residual and potential human rights effects of population transfer, in so far as they relate to the role and responsibilities of the State under international law.

17. Population transfer has been conducted with the effect or purpose of altering the demographic composition of a territory in accordance with policy objectives or prevailing ideology, particularly when that ideology or policy asserts the dominance of a certain group over another. The objective of population transfer can involve the acquisition or control of territory, military conquest or exploitation of an indigenous population or its resources. State action based on such reasons has not only caused suffering to vulnerable people and communities, but has often proved to be unmanageable in the long run. The consequences of population transfer, particularly involving deepened ethnic conflict, environmental degradation, resistance and even secession, may ultimately affect the very foundation of the State itself.

II. RELATING POPULATION TRANSFER TO THE BODY OF WORK OF THE SUB-COMMISSION

18. The human rights dimensions of population transfer, including the implantation of settlers, encompasses a number of the concerns of the Sub-Commission. The core subject of the Sub-Commission's work, minorities, has emerged as the focus of efforts by the Special Rapporteur, who has identified a number of dynamic situations in the relations between minorities and dominant populations, and recognized that the common experience of population transfer deserves specific consideration. 5/ In his second

progress report he identified social policies grounded in ideological concepts of State and nation that are pursued by Governments for the purpose of suppressing, marginalizing or otherwise exploiting distinct populations (or their resources) by removing them from their homes and lands. The present report expands on one of the prevalent aspects of this dynamic, and its relation with the Sub-Commission's central concern is reflected throughout the body of this document.

19. Recent trends in racism, discrimination, intolerance and xenophobia, as reflected in the report of the Secretary-General to the Sub-Commission in 1992, 6/ are rooted in new ideologies of "racialization", promoting allegedly insurmountable differences between cultures. The emphasis on culture, discrimination and other related concepts underscores the need to expand the parameters of the racism debate in the light of present realities. Whereas the theme of racism in the United Nations system has been largely absorbed by the struggle against apartheid in southern Africa, fresh attention to other features and mechanisms of racism might be enhanced by the present and future investigations of the human rights dimensions of population transfer.

20. Population transfer also integrates a number of the traditional issues within the purview of the Sub-Commission's work. Among them, "the right to leave and return" is a fundamental human rights issue with obvious links to population transfer. Transfer may manifest itself as a feature of special situations involving the derogation of human rights, and deserves attention in such contexts. For example, the exercise of special State powers may, in some cases, involve aspects of population transfer, and thus relates to the Sub-Commission's work on the question of human rights and states of emergency. 7/

21. The Sub-Commission has also taken the initiative of addressing the human rights situation of internally displaced persons. That effort has pursued ways to improve human rights protections not traditionally covered by relief and other agencies in the United Nations system whose mandate relates to cross-border refugees only. While that work deals with the aftermath of population transfer within countries and the improvement of humanitarian assistance mechanisms, it is intended in the present report to advance the common objective by focusing on the international legal issues pertaining to policies and practices that cause displacement. In its work to advance protection and prevent violative population transfer the Sub-Commission is encouraged by the work of the Commission on Human Rights on this global problem, and takes note of the comprehensive study prepared by Mr. Francis M. Deng, representative of the Secretary-General on the human rights issues related to internally displaced persons. 8/ The contributions of expertise, relief works and technical advice of specialized agencies and non-governmental organizations, whose field of operation includes service delivery, public information and policy analysis, are also greatly appreciated.

22. Efforts to ensure the human rights and dignity of all migrant workers should benefit from the clarification of law regarding population transfer, particularly where such vulnerable populations may be subject to arbitrary action to transfer or expel them collectively without due process. In

conjunction with other work to protect against all forms of discrimination, 9/ such efforts may relate to forward-looking measures to address human rights and mass exoduses. 10/ The work of identifying sources and features of population transfer may relate to the humanitarian objectives of other United Nations bodies as well, in particular, the Ad Hoc Working Group on Early Warning regarding New Flows of Refugees and Displaced Persons of the Administrative Committee on Coordination (ACC). 11/

23. In 1992, the Sub-Commission reaffirmed its decision to review the matter of forced evictions as a gross and consistent pattern of human rights violations, and took steps towards further analysis of this practice. 12/ The Commission on Human Rights subsequently adopted without a vote a resolution requesting the Secretary-General to compile an analytical report on the practice of forced eviction for the Commission's consideration at its fiftieth session. 13/ Forced eviction may form one of the central mechanisms of population transfer, particularly when applied on a large scale and against a distinct population group. Therefore, it is encouraging that this issue will be considered in the forthcoming report of the Secretary-General.

24. On the side of prevention of human rights violations through the development and elaboration of law, special note is taken of the efforts of the Sub-Commission to advance and to increase understanding of the right to housing and to elaborate the definition of this fundamental right through its Special Rapporteur. Among the notable contributions to this issue is the Special Rapporteur's recognition that the denial of the right to housing may be a consequence of planning and population transfer, especially under foreign occupation. 14/ The denial of the right to adequate housing and the resulting conditions may be sufficiently extreme, as some authors have suggested, to constitute a relationship with "torture and other cruel, inhuman or degrading treatment". 15/

25. The subject of study of the Sub-Commission's Working Group on indigenous populations bears an obvious and strong connection with the current and historical practice of population transfer. The Working Group's progress in reporting on conditions affecting indigenous people and in drafting the international declaration on the rights of indigenous peoples reflects an integrated effort also to avoid the effects of future population transfer on those quintessential rights. The contributions of the Working Group to emerging law are specifically discussed in the body of the present report.

26. Existing prohibitions on population transfer have been drawn upon in resolutions of the Sub-Commission and other United Nations bodies relating to specific cases. Population transfer has been a fundamental feature of the human rights situation in various countries and areas in which the United Nations has been seized of conflicts over the decades, including Cyprus, South Africa, Palestine, Cambodia, East Timor and, in the past decade, Haiti, Burundi, Sudan and Iraq, as well as the especially pernicious "ethnic cleansing" in the former Yugoslavia.

27. With the relatively recent focus on the nature and effects of development on environment and people, the Sub-Commission now finds itself in a position

also to derive an understanding of the experience of populations affected by population transfer in the context of large-scale infrastructural development projects. Such economic processes and the role and policy of international funding agencies emerged as a special focus of the Sub-Commission's work with the report of the Special Rapporteur on the realization of economic, social and cultural rights. 16/ Related cases before the Sub-Commission involve the phenomenon of population transfer as a consequence of some forms of large-scale development, although no specific Sub-Commission action has yet been taken.

28. Since the Sub-Commission was first convened in 1949, significant events and developments have taken place with regard to standard-setting procedures in human rights related to State-directed coercion of individuals and groups in general, and specifically to the involuntary movement of population. The present report takes these into consideration and serves to consolidate these developments in various quarters with established and emerging international law in order to explore the legal prospects for addressing and preventing any human rights violations which may arise from this underscrutinized phenomenon.

29. The population transfer initiative may contribute to the consummate objective of the prevention of discrimination and protection of minorities by recognizing common and long-standing violations that have been so far inadequately addressed, and by developing and strengthening law as a prophylactic measure. In doing so, it is important to identify the roots and mechanisms of the violation and clarify their relationship to international law as developed.

III. CIRCUMSTANCES AND FEATURES OF POLICY UNDER WHICH POPULATION TRANSFER OCCURS

30. The circumstances under which a population is forced or pressured to leave its homes are varied; transfers can be brought about as a consequence of armed conflict or in peace-time. These two broad categories of population transfer correspond with legal classifications relative to the discussion of causes. The practice and official rationale for forcing the transfer of populations have not changed significantly in the course of history, nor have the consequences. Technical aspects may have advanced, however, to increase efficiency and/or speed of transfer.

31. The causes of population transfer can be dramatic, or subtle and insidious. Transfer can be carried out en masse, or as "low-intensity transfers" affecting a population gradually or incrementally. The following section intends to cast light on the various situations and sources of population transfer. This discussion, however thorough, does not presume to be exhaustive. Nor are these categories mutually exclusive; any number of circumstances may coincide to cause a population's transfer.

A. Context of war/armed conflict

32. The following categories of causes give attention to population transfers resulting from military (or paramilitary) actions. Transfer may serve any combination of strategic, political or humanitarian objectives. They may be carried out by any party to a given conflict; however, post-conflict transfers

have historically been the practice of victors or belligerent occupiers. Thus, this category embraces transfers taking place during, as well as in the aftermath of, conflict.

1. Military imperative

33. The dramatic events of civil and international wars, with the movement of combatants and collateral damage, may threaten civilians and their structures, compelling flight. On the pretext of wartime military necessity, or as a means of protecting civilians, populations are forced from their homes. Although proscribed by the laws of war, the transfer of civilian populations to serve a strategic objective has not disappeared from human experience.

34. Political violence and counterviolence in the form of pogroms and purges can be directed against members of distinct groups and communities as such, regardless of their status, affiliation or political role. Jurisdictions and zones of influence, including municipal and interstate borders, may be modified. Consequent flight and resettlement out of the home area or across borders may, in some cases, be the only viable response of unarmed populations to persecution. 17/

2. Foreign occupation

35. One of the principal devices used by an occupying Power to extend control over a territory is to implant its own, or other reliable population into the territory. Although they may serve a military objective and may even be armed by the occupying Power, settlers implanted in occupied territories are claimed by the occupying Power as its "civilian" citizens. Thus, the occupying Power eventually asserts that humanitarian concerns compel it to remain in the territory to extend its protection to the implanted population. This argument may be combined with other ideological claims concerning the occupier's "right" to possess the territory for putative security and humanitarian reasons, or even on the basis of rights, such as "historical rights", which have no legal basis. This policy is typically coupled with incremental and/or large-scale expulsions of the indigenous population. In such cases, the right of the indigenous population to return is usually denied, ostensibly for "security" reasons, despite the prior obligations of the occupying Power to respect the refugee's right of return.

36. In addition to the occupier's security claims, the implantation of settlers from the occupying Power's own population is sometimes used with a future, non-military strategy in mind. In the event that the status of a disputed territory is resolved by eventual referendum or plebescite, this putatively democratic procedure can be greatly influenced with the participation of the implanted population on an equal footing with the indigenous population. Even if this process results in the eventual separation of the occupied territory from the occupying Power, the settlers' participation may influence the terms and conditions of the future status of the territory in a manner that serves the former Occupant.

37. In addition to facilitating or directing the influx of its own population through settlement, the occupying Power also may contravene the terms of international law by expelling individuals or groups of the occupied

population, prosecuting policies which deny them their residency rights, or creating economic or civil conditions which compel the indigenous population to leave. An array of measures, involving economic pressure, altering the legal set-up or using armed forces (including armed settlers), typically are applied following the initial seizure of territory with the ultimate effect of transferring the indigenous population out of the occupied zone.

3. Pretext of "national security"

38. Under perceived or actual military threat, the authorities of a State may establish that a class of citizens or residents – determined by "race", religion or other criteria – is identified with the source of that real or hypothetical threat. Authorities may transfer members of this special group away from a border or into organized internment. In order to garner popular support for such a policy, a requisite public information effort may be exerted, which may confront international law prohibitions against all dissemination of propaganda inciting racial discrimination. 18/ In the process, property belonging to the group may be confiscated, families separated and other adverse conditions may prevail. 19/

4. Food and health care as a weapon

39. Attention has only been drawn relatively recently, as a result of current cases of extreme deprivation leading to population transfers, to the pernicious targeting of certain populations through the denial of food or needed health care. By inverting these basic needs into a tool of social control, States have created or exacerbated political crises, such as civil and international conflicts. One of the more prominent examples of this condition resulting in population transfer is the imposition of economic sanctions by other States which have the extreme effect of limiting or denying food or medical services to civilians. Particularly when such denial coincides with or follows armed conflict, it can result in chaos and displacements of civilian population within the affected State, or across international boundaries.

40. Those affected by natural disasters can also become the targets of food or health care deprivation when authorities or combatants deliberately starve a population for political purposes, or fail to fulfil humanitarian obligations on the basis of an ideological or other motive to punish the affected population.

5. Post-conflict transfers

41. Wars, including civil wars, in this century have been largely fought along ethnic or sectarian lines, and the commensurate antagonisms have been felt in the non-combatant populations. Transfer of a population during conflict may reflect these antagonisms, or emerge from a search for expedient resolution between conflicting parties involving separation of civilians along ethnic lines. Such measures can be carried out by consent of the parties, or be imposed by one (usually a victorious) party to the conflict.

(a) Preference of victorious Power(s)

42. During or after armed conflict between or among States, past practice has seen victorious Powers create conditions for the movement of certain populations, on the basis of either ethnic or geographic criteria. These conditions can include bilateral or international agreements between Governments, involving varying degrees of human rights protection. Such transfers often coincide with territorial transfers and may involve the agreement, either by expressis verbis or tacitu consensu of the affected State(s). Alternatively, the population transfer has, in some cases, been forced upon populations within the vanquished State, or those outside of it corresponding by ethnicity or citizenship to that State, as the terms of surrender or "reparations in kind".

(b) Option agreements/population-exchange treaties

43. Historical cases reflect a now-foregone belief that population transfer may serve as an option for resolving various types of conflict, within a country or between countries. The agreement of recognized States may provide one criterion for the authorization of the final terms of conflict resolution. However, the cardinal principle of "voluntariness" is seldom satisfied, regardless of the objective of the transfer. For the transfer to comply with human rights standards as developed, prospective transferees must have an option to remain in their homes if they prefer.

44. With strict regard to the terms of the exchange agreements, some historical transfers did not call for forced or compulsory transfers, but included options for the affected populations. Nonetheless, the conditions attending the relevant treaties created strong moral, psychological and economic pressures to move. "Option clauses" were contained in population exchange treaties involving border changes, such as those between the Third Reich Government and Eastern European countries, 20/ and between the Soviet Union and new States from the old Russian Empire, as well as between Soviet-annexed territories and neighbouring countries. 21/ These option clauses find their roots in European practice dating at least from the Treaty of Capitulation of the City of Arras (1640) and the Treaty of Breda, between Louis XIV and Anne of England (1667).

45. The secretive nature of some historical population exchange treaties would today contravene fundamental principles of "good governance" and would be largely impractical. Still, however, the terms of recent transfer agreements have been censored apparently to avoid dissent or to keep secret parallel arms transfers and other related arrangements which may violate contractual restrictions or other international law. 22/ Other State-directed schemes to direct migration (against the preferences of the migrating population) have also included unpublicized terms concluded as part of a "strategic alliance" between or among cooperating States. 23/ Such transfers are generally associated with a period of real or potential conflict. The removal of transferees may be organized ostensibly for humanitarian reasons; however, other motives of social engineering policy or political expediency may also be present. Although practices such as those

associated with the Third Reich are today unconscionable, secret population transfer agreements may persist that affect the human rights of concerned populations.

B. Non-wartime population transfer

1. Man-made environmental degradation

46. Environmental degradation caused by economic exploitation or technical destruction can render an area uninhabitable, forcing population transfer. In response to such manmade disasters, residents may be compelled to leave, by the resulting conditions or the State may resettle them in the interest of public health or safety. It is important to consider the cause of the degradation in the light of any pattern suggesting State responsibility and consistent effect on a distinct population. Technical responsibility for environmental disasters resulting in population transfer may also involve human rights values and help determine appropriate responses.

47. Forced transfer may be the unexpected result of poorly planned or executed development. In one country hard hit by famine and social upheaval in the past decade, development schemes have actually exacerbated the local situation. A notable development programme there, for example, destroyed much of the grazing lands and forests upon which some 150,000 pastoralists depended for their livelihood. When the World Bank subsequently funded the conversion of most of the irrigable land into cotton and sugar plantations in the mid-1980s, the consequent displacements rendered 20,000 people completely dependent upon imported food relief. 24/

2. "National development"

48. Economic displacements caused by radical changes in modes of production account for a significant portion of non-wartime population transfers. Such transfers may be carried out for the sake of industrial installations, mining or other large-scale commercial enterprise.

49. Infrastructural development projects consistently result in large-scale removal of inhabitants from their homes and lands. Projects such as hydroelectric dams, create conditions of submergence and other changes in the primordial habitat which force residents to flee, acquiesce to State-sponsored resettlement or perish. Sometimes, these economic population transfer processes run parallel to State policies of social engineering intended to enhance State control over a territory or region and/or the peoples dwelling there, either within, contiguous to, or even outside the State's de jure boundaries.

50. In areas of extreme poverty, populations affected by development projects may be particularly vulnerable. Even when the transfer of a population is motivated by the need to ensure its survival, the physical and human rights situation could deteriorate if the transfer is not executed properly. Some human rights investigations have indicated that low health and life expectancy assumed to be caused by famine may have actually resulted from conditions of planned involuntary resettlement. 25/

51. As with all civil planning, the ethic and purpose of sound national development policy is to serve the "greater good". This concept can be interpreted subjectively, and a considerable debate may emerge from the question of who is to benefit from a given project or policy. Some development schemes may violate fundamental rights of a population, especially when a distinct population is disproportionately harmed in the process. Where affected populations have begun to speak on their own behalf, the human rights values at stake are belatedly being heard at planning and policy levels of development.

52. In the past century, the lands of indigenous and tribal peoples have been appropriated at an accelerated rate under centralized authorities, by both colonial and independent governments. Over the past 50 years, many such peoples have experienced more land loss due to confiscations than in all of the past half-millennium. In most countries today, governments still refuse to recognize forms of ownership which are not confirmed by their own records, thus tribal and land-based peoples' customary-use, treaty and even titled lands have been systematically appropriated by the State for development purposes under "eminent domain", "plenary powers" and other legal doctrines. These lands, which were previously considered to be remote and peripheral, have increased in demand as the subject of expanding national development schemes. An Asian analyst has summarized this process as one "by which the rich and more powerful in society reallocate the nation's natural resources in their favour, and modern technology is the tool that subserves this process". 26/

53. Consequently, the lands owned by these formerly peripheral people have assumed greater market value, and their acquisition and development often assume the removal of the lands' primordial inhabitants. Development projects, such as roadbuilding, power plants, military installations, mining, forestry and water schemes, and even wildlife sanctuaries and national parks typically call for the removal of the inhabitants of the requisitioned land sites. Since the Second World War, the most dramatic cases of indigenous and tribal peoples' land loss and transfer have resulted from hydroelectric dam construction. Simultaneous with the consequent environmental disruption, social dislocation from dams affects tens of millions of people. 27/ Such projects funded by the World Bank over four years alone resulted in the involuntary transfer of nearly half a million people. 28/ In one country whose large dam-building campaign was launched upon independence in 1947, that programme has caused the expulsion of some 21.6 million people from their homes and lands in its first 40 years. 29/

3. Political control

54. Forced transfer of populations distinguished by their political position has been carried out to serve the interest of dominant groups or governments. Such programmes as "villagization," or "systematization" have involved radical changes in the physical conditions, modes of production and social fabric of affected populations. The net effect of these policies is the political control, marginalization or replacement of a population perceived to oppose, or harbour resistance to the dominant group.

4. State integration/consolidation

55. Integration and consolidation of the State are terms of State formation which echo the nineteenth century experience of the Western hemisphere, where "integration of the State" or "manifest destiny" were slogans for an expansionary process that involved forcible removal and physical elimination of indigenous populations. Further, the colonial-era processes in colonized Asian countries at roughly the same time transformed the demographic composition of remote regions and extended control over them and their resources by implanting settlements with reliable populations. Historically, this has involved forcible removals for political expediency, simultaneously with the development of compatible legal pretexts to facilitate and justify transfer, notably including the wholesale denial of legal rights of seasonally transhumant populations to the lands they owned in common. 30/ Many of these legal concepts and their consequences still persist.

5. New State formation

56. Newly independent countries in the process of formation commonly seek to establish and maintain a common identity which binds all the citizenry. A State priority in a decolonized or developing country is to promote comprehensive and simultaneous development in all areas under the State's control. Sometimes this involves the forced settlement of transhumant populations, or the transfer of population segments designated by policy planners as filling a particular role in national society under new modes of production.

57. It is important to note that the new imperatives and ebullience of the moment of independence may cause policy planners to derogate certain rights of distinct peoples and population groups whose rights to consent, participation, internal self-determination or other human rights may be at stake.

6. Ethnic homogenization and separation

58. A number of political solutions are available to States faced with problems of governing a plural society. As explained in the second progress report of the Special Rapporteur on the protection of minorities, 31/ State responses may range from homogenization to separation. Each point on the policy spectrum is neither intrinsically benign nor malign; that determination would rest on a variety of human rights criteria. Homogenization and territorial separation fall into two general categories: those based on egalitarianism and those based on dominance. The egalitarian - and, therefore, legal - nature of physical separation of populations requires consent and voluntary movement. The criteria for egalitarian territorial separation, according to the Special Rapporteur, entail:

(a) Voluntary choice of each party involved;

(b) No hierarchical ranking between groups;

(c) Sharing of common resources on a basis of equality;

(d) Whenever the groups interact, there are no privileges for members of one group to the detriment of members of another group. 32/

59. Violative forms of homogenization policy may involve purposeful demographic manipulation and the practical negation of the previously held identity of a person or group. Such measures may obstruct the enjoyment of the rights of free association, consent regarding the development of one's own community or demographic unit, and other group rights. Homogenization can contribute to the loss of culture and certain social rights, for instance, through imposing legal prohibitions against customary land-use patterns, political structures, or the use or teaching of one's language which is different from the official or dominant one.

60. The extreme version of dominant separation, apartheid, seeks, in its classical sense, to keep peoples territorially separated, on the basis of their physical and cultural characteristics. In some variations of the practice which may be habitually referred to as apartheid, other criteria may serve as the basis for separation. Under apartheid, population groups remain unmixed and ranked in hierarchical divisions. The purposes of such a policy, not necessarily limited to its implementation in South Africa, is formally to exploit and marginalize the non-dominant group for labour, or to acquire and transfer territory, natural resources or other property to the exclusive use of the dominant group.

61. The policies of forced segregation and assimilation pose serious human rights problems for the subjects of ethnic engineering programmes, and some forms of separation may be violative in ways that are not immediately apparent. For example, an insidious apartheid policy may extend "independence" to newly established demographic units resulting from transfer, sometimes under puppet regimes. This separation does not reflect self-determination of the subject population and proposes a separate "legal" status, recognized under the law of the transferring State, which has the function of negating the transferees' right of return to their original homes and lands.

62. Some policies of homogenization for political reasons may be disguised under the pretext of a natural or man-made emergency. In a recent case in which a Government accelerated its resettlement plans in response to famine, precious resources were spent on transferring affected people - many against their will - to resettlement zones carved from the traditional lands of other resident people in another region of the country. A year after the issue was raised at the Sub-Commission, 33/ the exiled Government official responsible for the resettlement programme admitted that it was, in fact, designed to enforce ethnic homogenization. 34/

7. Expulsion of aliens or national minorities

63. One of the most frequent circumstances of transfer involves the expulsion of a population group across State borders into a receiving State. The impetus for such expulsion may be economic or ideological (racist or religiocentric) reasoning. The expulsion typically targets either resident aliens, for example migrant workers, or minority citizens and often involves the confiscation or forfeiture of the expellees' property.

64. In recent years, the most common victims of this policy have been workers and their families who are citizens of another State, or stateless persons who are not naturalized citizens of the expelling State. The subject populations commonly originate from a neighbouring State or territory, and the arbitrary, abrupt and mass nature of the expulsion is incompatible with due process requirements for the deportation or expulsion of legal entrants. The naturalized and native-born family members of the target group may be likewise affected.

8. Demographic situations resulting from historical conquest

65. Throughout history and until the present day, the seizure and long-term occupation of territory has depended largely on the transfer of populations. The acquisition of territory by military force is generally a preliminary step towards achieving the objective of control of a given territory. When the occupied or annexed population is ethnically different from that of the occupying Power, that Power assures its hold on the seized land by replacing its population with a more compliant group. This may be accompanied by various means of removing the indigenous inhabitants and/or their children, or simply by implanting settlers with the purpose or effect of diluting the occupied or annexed demographic unit. This process may take years to accomplish, and has been the experience in the Americas, Central and Eastern Europe and some parts of Asia and Africa, as well as much of the colonized world.

66. When the political status of the occupied or annexed territory changes through some form of political separation from the previous occupier, a variety of demographic situations may obtain, depending on conditions. For instance, if the settler population in the formerly occupied or annexed territory is contiguous to its "mother country", a majority may return with their progeny there. However, if a change in the political status of a territory takes place after generations of occupation and settlement, such a resettlement may prove more complex and problematic. Particularly if the occupied or annexed territory is not contiguous to the country of the occupying or annexing Power, different formulae may emerge, perhaps involving pluralistic schemes of governance. In any event, the ultimate disposition of the implanted population and its descendants and their relationship to the successor government of the formerly occupied country involve a number of human rights issues that may be guided by current and emerging international law pertaining to "good governance" and individual and group rights.

9. Planning for "public purposes"

67. Providing sufficient land to meet present and future needs is a problem facing many local and national authorities. The compulsory acquisition of land for "public purposes" should serve a common interest, or pursue a social need or necessity. However, with the best intentions, human rights may be negatively affected by both the planning and implementation of public-purpose projects.

68. A significant factor in the creation of disaster through development-related population transfer lies with the planners. 35/ Large-scale development is planned with government and engineering interests

foremost in mind. However, the planners at all levels may fail to consider, or consult adequately the affected communities to assess their physical, spiritual and economic needs. The World Bank's independent review of Asia's largest ongoing hydro-dam project determined that the ambitious scheme is being undertaken "in almost total ignorance of the people and the impact". 36/ On the operational side of the World Bank, an internal review recently assessed that a major factor in the increased failure rate of World Bank projects has been the pressure inside the Bank to lend money, which has emerged as the project concern which has subsumed all others. 37/

69. Project planners often make disastrous assumptions without a factual basis. One crucial issue related to population transfer is the dilemma of land scarcity. The lack of replacement lands creates conditions that ultimately lead to governments reneging on replacement-land promises, overcrowding, the scattering of families and communities, and transferees being forced to encroach on the lands of other communities.

70. Under the laws of most countries, squatters, residents of "informal settlements" and others dispossessed for public purposes typically are excluded from compensation for the State's acquisition of "unauthorized" or "illegal" structures, although ex gratia compensation may be offered in some cases. The planners' classification of a residence or human settlement as "unauthorized" may itself be violative, particularly where a pattern of such classification disproportionately affects a distinct population group. Denial of recognition thus functions as one of the legal mechanisms for planners and State agencies to effect population transfer, which may form part of a larger pattern of demographic manipulation.

71. Although most countries have an established public machinery for planning, the managerial and technical skills are sometimes weak. Planning authorities in many developing countries, for example, are primarily engaged in housing the poorer segments of society, or improving services in response to a crisis. 38/ Planning is carried out under the administrative authorities of government, where a policy of discrimination already may exist. In such a context, planners serve as instruments for the dispossession and transfer of populations where human rights criteria are not enforced. Moreover, planning, per se, can be antidemocratic and enforce living conditions and patterns which contradict the economic, social and cultural needs or identity of the target community. In this sense, planning can cause gradual disintegration of social groups and, thus, become the agent of insidious forms of population transfer with far-reaching local, national or regional effects.

72. In general, contemporary urban development patterns often reflect segregation along any combination of class, religious or ethnic lines. The consequences of this segregation potentially lead to social divisions and ethnic conflict between or among groups. But planning regimes can either alleviate or exacerbate these patterns and consequences.

73. In order for development to be socially viable, planners should represent the priorities and needs of the community they serve. Too often, however, planners and their designs are alien and indeed antagonistic to the communities which they affect. Thus, "public purpose" can stand as a

euphemism for the transfer of benefits from one population group to another on a preferential basis, and may violate international legal standards prohibiting discrimination.

10. "National security"

74. A compulsory transfer of citizens may be carried out for ordre public or security purposes. However, the circumstances in such cases must be weighed with regard to the competing interests and the validity of the State's claim of necessity against the humanitarian injury which may result.

75. Expulsions and population transfer may be carried out under the pretext of "national security" during states of emergency and other situations involving the derogation of human rights in their own right. The methods and criteria for targeting the subject population may qualify as issues of human rights concern.

76. Ideological and strategic notions of "the living frontier" and other objectives to accelerate development by transferring - through economic pressure or coercion - a population may negate certain human rights, particularly those of the host population. Such transfers may lead to international perceptions of potential cross-border effects.

11. Balancing population density

77. Some State-directed schemes of population transfer in rural areas are ostensibly the result of acute population pressures, where a population imbalance in a country, territory or region has necessitated a policy of implanting settlers in frontier areas of less-dense population. These State-directed schemes are nonetheless referred to in the social-science literature as "spontaneous settlement formations", and are generally designed to benefit poorer segments of the overcrowded population. (However, some genuinely spontaneous settlement may coincide). It has emerged that certain such programmes primarily benefit neither the landless nor the urban poor, as is frequently stated. In these cases, it turns out that the initiators of the process are absentee landlords, rich farmers, land speculators, traders, or even government officials, whose movement reflects no correlation between poverty and the decision to migrate. 39/ The poor settlers and rural indigenous population are generally used as wage labourers, contract farmers, tenants or sharecroppers. 40/

78. The indigenous population in the area of such new settler implantation often undergoes direct or secondary displacement. New market forces and land seizures are introduced to remove the indigenous population from the lands targeted for new "spontaneous" settlement. A wide gamut of human rights consequences affect the indigenous inhabitants, including the possible violation of their rights as a self-determination unit. As the settler movement advances, environmental consequences also have a disproportionately negative effect on the habitat and livelihood of the indigenous group, who largely depend upon the natural environment for subsistence and a significant share of revenue. 41/ Typically, settler activities, such as shifting agriculture and infrastructural development, also cause a considerable waste

of biomass through forest depletion, as well as the loss of certain plant and animal species and genetic resources, soil exhaustion, erosion and consequent flooding.

12. Racism and discrimination

79. With regard to the features that motivate population transfer, a pattern of discrimination also emerges. This feature constitutes both a cause and an effect in most population transfer cases. Where population transfer consistently and exclusively affects a particular distinct racial or religious group, internationally recognized human rights protections may apply. For example, the indigenous and tribal peoples may be consistently or exclusively subjected to forcible transfer, with all of the predictable, harmful consequences. In other cases, lands belonging to one population may be consistently appropriated by the State, only to be transferred to the sole benefit of another population group. It is not possible to generalize here whether this pattern is deliberate or consequential; however, when examined, a pattern in some countries strongly suggests that an objective of population transfer involves creating conditions that marginalize or eliminate the presence of distinct peoples as such.

IV. CUMULATIVE EFFECT

80. Regardless of the political context, the legal classification of causes, or the increments of population affected, the potential for human rights violations in such practice is clear, and the common consequences can be severe, virtually stripping affected persons and groups of their most fundamental rights. Moreover, the official prosecution of population transfer has a number of serious implications for responsible States and governments.

81. Unless otherwise indicated, the effects of population transfer on people, discussed here first, are common to cases carried out in any of the above-mentioned circumstances. This discussion is followed by a partial list of consequences for States involved, both as protagonists and as respondents, to situations which flow from the transfer.

A. Consequences for people

82. Transfer requires people to relinquish rights to their place to live. This involves a wide spectrum of resulting material and intangible losses. The human rights dimensions of population transfer relate to this spectrum of consequences. Again, the consequences set out below do not constitute a complete list of prospective effects, which may arise separately or in combination with others. However, the following discussion elaborates on the most serious and prevalent consequences of population transfer for the people affected.

1. Physical and medical effects

83. The most severe immediate or long-term consequences involve the loss of life. Death may result from transfer-related illness, or directly from the brutality and violence applied in the execution of forcible transfers, including deliberate food deprivation and severe economic hardship.

84. Perhaps the most obvious and dramatic of the physical consequences of transfer involves the use of force and violence by authorities or others effecting transfer. Particularly in the context of armed conflict, physical injury and death by a variety of means, including outright killing, are known. The hazard of such physical harm and death increases both with the violent nature of the context and the counter-response to resistance arising from the community opposing their transfer.

85. In cases which involve bringing a relatively isolated population into contact with alien, cosmopolitan populations, previously unknown communicable diseases typically decimate the more isolated group. Transfer alone may also result in the introduction or emergence of new diseases with long-lasting effect. 42/ More commonly, the housing and sanitation conditions which prevail for refugees and other transferred populations are such that lead to sickness especially among the more vulnerable children and elderly among them. Typically, too, the conditions of transfer lessens resistance to common diseases and infections, which may be exacerbated correlative to distance transferred. 43/ The problems of economic adjustment may result in undernutrition or malnutrition during periods of unemployment and food shortage, or with the break up of families through death or separation and the consequent loss of breadwinners or food preparers within a family or community. The cumulative effects of the transfer may complicate efforts to contain disease and other medical consequences.

86. Many of the stressful effects under most population transfer circumstances may be difficult to measure and, thus, often go unrecorded. Nonetheless, such consequences are no less real than the physical ones. The range of stressful effects has been the subject of study by both social scientists and the World Bank. 44/

87. These stressful effects mainly fall into three general categories: psychological, physiological and economic/material loss. Psychological stress involves "grieving for a lost home", a syndrome characterized by anxiety for the future and a feeling of impotence associated with one's inability either to control events affecting oneself, or to protect one's home and community from disruption. Such stress may be so severe as to cause physiological stress, involving the onset of new or increased health disorders.

88. Concerning physiological disorders, communities subjected to transfer have been recorded as having increased mortality and morbidity rates, including dramatic increases in infant mortality. 45/ These patterns may become reversible, in time. However, the loss of life is not, nor are the consequences from stress which is sociocultural in nature. In other words, communities may never recover their equanimity after transfer.

89. The third category of stressful effects is broadly characterized and has wide-ranging human and social consequences. The involuntary loss of home, property and community severely reduces "the cultural inventory due to a permanent or temporary loss of behavioural patterns, economic practices, institutions and symbols". 46/ Thus, culture is profoundly affected by transfer, and many subtle, but important, cultural features may be irreversibly lost.

2. Economic effects

90. Transferees forfeit various immovable assets, including land and housing and improvement investments in both. They lose access to economic activities, jobs and public services, as well as non-economic assets, such as holy sights, burial grounds and the like.

91. Familiar common property and non-title-based usufruct systems evaporate, and exchange and property-transfer systems disappear and are replaced by alien systems. Regardless of the motive of the transfer, the shunted population typically experiences the hardship of long-term impoverishment. The immediate and/or cumulative consequences are reflected in a number of health problems, either related to the conditions of transfer, the conditions at the destination or resettlement site, the various forms of stress related to the transfer, or any combination of the above.

92. Those transferred or expelled from urban settings experience the disruption of most forms of commercial activity, lose regular employment and sacrifice wages and salaries. Economic activity is cut off from suppliers, distributors and clients. Rural communities are separated from their crops, irrigation works, trees and forests, and fishing waters. Each of these losses creates immediate and lingering hardships, as well as the suffering associated with them.

3. Land loss

93. For the rural communities which are the typical victims of population transfer, the principal and most obvious effect is the loss of land and property, both owned privately and in common. When land-based communities are affected, the lands and properties confiscated, degraded or submerged have unique value. Not only were these lands the principal source of livelihood, but the identity of the individual and community are closely linked to the specific place, and no amount of monetary compensation or replacement land can make up for the loss created in the psychological or metaphysical dimensions of the transfer victims' lives.

94. Land speculation and other market forces usually inflate prices around development projects, and alien settlement prohibitively increases demand and prices for goods and services for the host population. Typically, such forced removal schemes provide sorely inadequate compensation to transferees, if any at all. Hence, where displaced people have been forced to purchase new lands, the transferred population is usually only able to purchase by incurring insurmountable debt. Owing to the capitalist unsophistication of many transferred people, the new uncertainties as to their revenue and subsistence, the high cost of assimilation and the need to purchase commodities which were of little or no cost back home may have a shocking and debilitating effect on them. Many rural transferees who are fortunate enough to purchase new land often lose it to creditors in a few short years. These factors and the usual inadequacy of the (purchased or State-provided) lands in resettlement sites commonly transform transferees into menial workers, not infrequently as surplus or bonded labour. 47/ Forced removal schemes often result in the loss of means of living for those who remain in the area from which mass

transfer of population takes place. For example, the merchants and barbers may not be able to carry on their business with the reduced population.

95. Typically, tribal or other land-based people displaced from their habitat can suffer a severe reduction in food sources commensurate with the net loss of land. This phenomenon has been reported as pandemic, and social science analysts have observed that "almost universally, governments fail to pay proper attention to how relocatees are going to make a living after removal". 48/ For land-based peoples who have been forced from their lands and community, their readjustment to life is uncertain.

96. Even when government resettlement programmes exist, replacement lands are often provided by appropriating private or customary-use lands belonging to other long-settled communities. This inevitably sparks resentment and creates the conditions for bitter conflicts between the resettled and host communities. New social conflicts have been reported to have emerged in a number of resettlement schemes in the past decade. 49/

4. Sociopolitical effects

97. The cessation of a variety of familiar and gratifying social, economic and religious activities linked to the old home are related to an overall breakdown of social structures, especially political structures.

98. Political consequences for the transferred population include a characteristic crisis of leadership. Traditional authority is undermined, and the potential for community cooperation and reciprocity is broken, often irreparably. Traditional leaders of transferred communities find themselves cornered; they lose their legitimacy if they approve of the community's transfer, usually against the majority, and they also risk proving themselves powerless if they unsuccessfully oppose their transfer against the will of the enforcing power. Invariably, transfer has the effect of destroying a community's cohesion as a political unit, and if political structures remain intact at all, they most often become dependent upon the transferring authority (the State) in a number of ways.

99. Transfer weakens or severs social networks, and disperses communities and kin groups. This may result in the loss or abandonment of social mores and traditions, leading to further deterioration of familiar codes of behaviour, ethics and value systems. Not only physical separation, but new economic imperatives after transfer may lead to radical change in the roles and behaviour generally attributed to gender, class and age groups within a community. Such dynamics tend to create collateral social breakdown with unforeseen consequences.

5. Ethnocide and genocide

100. Although it has not been developed as a legal term, social science literature has recognized and defined the phenomenon of "ethnocide", most notably over the past three decades. 50/ Writers have applied variations of common understanding of the causes and effects of ethnocide, and most definitions generally refer to the role of State and government policy as instrumental in the process of eliminating the cultural aspects of existence

for a people. The cumulative effects of population transfer appear to coincide with the ethnocidal process as characterized to involve a State destroying or usurping control over the vital cultural elements or resources of a distinct population, people or nation, up to and including the ultimate elimination of such elements. 51/

101. Both land-based and urbanized transferees suffer varying degrees of loss of cultural identity, depending on the extent to which that identity is linked to the place of residence. For example, where population transfer is the primary cause for an indigenous people's land loss, it constitutes a principal factor in the process of ethnocide. This factor alone may so severely impair a population's living conditions through loss of food resources, deterioration of health and increased infant mortality that significant deaths may occur within the group. Particularly where these effects are foreseeable, sufficient evidence may exist to demonstrate official intent to cause physical harm to the affected population. The cumulative effects of population transfer may, therefore, coincide with one or more of the definitions of genocide (discussed below).

B. Consequences for States

1. Economic consequences

102. Many State-directed schemes involving population transfer for reasons of economic development are considered failures with particular regard to the economic rates of return and community formation. Both planners and appraisers tend to exaggerate the expected benefits during the initial years of the transfer, but integrated development may result from such schemes in the long run, 52/ albeit after the target population incurs considerable cost. (This seems to be true as well for voluntary settlers.) There do not seem to be any viable examples of development success from economic population transfer over several recent decades, and the target population's inability to move beyond subsistence, for a variety of reasons, is a major reason for the need for continued State assistance.

2. Ethnic conflict and resistance

103. As population transfers have recently come under study, accounts indicate increasing instances of resistance. 53/ The violence that frequently accompanies population transfer, as well as the losses and human rights violations incurred by individuals and communities, provide strong motives for violent responses to the State and its agents responsible for, or presumably benefiting from the process.

104. Factors leading to resistance involve:

(i) The possibility to resist: the cause of the transfer and the nature of the force effecting the transfer;

(ii) What is at stake: the relationship of the affected population to the home environment;

(iii) Historical factors: the relationship of the target population to the agent of transfer, usually the State (with or without the military). This can be complicated by ethnic differences related to which group retains State power and which group is subject to it. Resistance may occur whether or not the transfer involves planned resettlement of the subject population. 54/

105. A World Bank source recognizes resistance and characteristic hostility to the idea and fact of State-directed transfer as "normal ... and expected". 55/ Measures to alleviate the effects of population transfers - whether conducted under political or economic programmes - have emerged rather late in the long history of its practice; however, planners and executors of population transfers evidently have operated with full consciousness of the resistance they are bound to encounter. 56/

106. The reasons for resistance and the degree of hostility may lie in the physical and historical circumstances related to the transfer. Transfers for purely economic reasons may eventually culminate in readjustment of the affected community, while conflicts arising from political transfers tend to be open ended, even atavistic. It can be said that the potential for conflict is endemic to population transfer.

107. Some may choose to accept the transfer schemes of an infrastructural development project as a fait accompli and seek instead merely to improve the conditions of resettlement. Even conflict within the affected group, especially between the community and its leadership, and between the community and its actual or potential allies elsewhere, who may then perceive them as legitimizing the whole questionable development approach.

108. The threat, or execution of transfer of a group by another powerful, ethnically distinct group may have the effect of inspiring or reviving ethnic sensibilities and identity which rally the group in defence against a perceived common adversary. The oppositional process has been identified as a primary factor in the maintenance of ethnic identities against assimilation or other forms of ethnocide. Particularly when the conflict touches on questions of land, with its close links to heritage, religion, ancestry and world view (ideology), groups tend to become galvanized in the face of external threats. 57/ Especially where ethnicity is already a source of conflict within society, the attempt of population transfer may escalate these conflicts far beyond their original dimensions or cause. Conflict may provide the context by which an affected population perceives events in logical order, and seeks to regain control over them.

3. Armed insurrection

109. The population transfer-related cases of resistance escalating to armed insurrection are well documented and regrettably numerous. However, just as prevalent is the failure of resistance movements to prevent involuntary transfers. Although the armed movements may be a minority among cases of resistance to development-related transfer, they have nevertheless demonstrated the potential for transfer to result in extreme cases of conflict.

4. Secession movements

110. The politicization and ethnicization of the subject population in opposition to transfer has, on occasion, led to demands that encompass far more than the issue of resettlement. The more militant expressions of political empowerment have emerged as demands for secession (if the group was previously acquiescent to the State), or self-determination, taking any number of forms. While such demands usually arise out of a long history of disaffection with the State, population transfers may bring a population to its breaking point, whereby it emerges from acquiescence to seek political independence.

111. Containment of such movements can prove costly, in every sense, for all parties concerned. Certainly a military response to this resistance is not seen as less expensive than a positive programme to address the needs, grievances and aspirations of the affected population, especially those already on the table before the transfer plan. Active resistance to transfer forges a clearer sense of identity, valuable alliances, more concise agendas of community needs, the elaboration of strategies and the assertion of needs. Empowerment may emerge from such struggles and enable people to confront the State.

112. Regardless of the outcome of either armed resistance or secession claims, the transfer debacle and resistance to it can challenge the very foundations of the State and the ideological premises upon which its cohesion depends.

5. Cross-border migration

113. Population transfer within a country or occupied territory can result in the flow of refugees across international borders. Although not obliged to do so by law, the receiving State usually diverts resources to meet some of the immediate needs of the transferred population, and this burden may persist despite the relief work of the United Nations and intergovernmental and non-governmental agencies. Such agencies may not help in many aspects of the adjustment, as with the costs of advanced training and placement of the refugee workforce, law enforcement and other civil protection, land for housing and other infrastructure, as well as any medical and environmental consequences for the host society resulting from the absorption of the alien population. The cross-border migration also raises administrative problems related to extending civil status to the entrants and related legal complications.

6. International responses

114. The escalation of resistance and the State's repressive mechanisms can foster a confrontation that may threaten regional or international peace and world order. In such an instance, the international community may be compelled to respond through various mechanisms and collective actions to activities considered to be an internationally wrongful act. These responses may involve rhetorical and legal condemnations, travel bans and economic sanctions, as well as a unilateral or collective economic, political or military response. Such involvement may result in the restoration of human rights or the preservation of the State at the expense of its constituent

sectors. An international failure to respond may result in a violation by other States of their treaty obligations to ensure respect for and to maintain humanitarian and human rights standards. 58/

V. BILATERAL POPULATION EXCHANGE AGREEMENTS AND TREATIES

115. In this century, population transfer has occurred as a result of the application of the provisions of international and bilateral conventions, often called "option agreements" or "population exchange treaties", dating back to 1913. 59/ The post-First World War peace settlement of 1919 attempted to solve problems attributed to the presence of minorities within States by eliminating some potential sources of grievance and offering protection through the League of Nations. The Minorities Treaties recognized the rights of minorities to take active part in the political life of the State in which they lived, while allowing them to retain their own national heritage and culture. The interwar exchange agreements did not call for wholesale transfers of population, but offered individuals the option of voluntary emigration to the State corresponding to her/his ethnicity, while also alleviating individuals' resulting financial burden. This option was first adopted and exercised in the Balkans, but then only as a supplement - not an alternative - to protection.

A. Inter-war "option agreements"

116. At the peace conference, the Greek delegation proposed to the New States' Committee that a minorities-exchange convention be concluded among Greece, Bulgaria and Serbia. The Committee was receptive, but Serbia rejected the idea. However, Bulgaria and Greece agreed at Neuilly-sur-Seine 60/ to provide for the "reciprocal voluntary emigration of the racial, religious and linguistic minorities in Greece and Bulgaria". This was viewed as a resolution, in part, of the demographic confusion resulting from the territorial transfers and forcible population movements of the first and second Balkan wars, and applied to the estimated 37,000 Greeks in Bulgaria and some 150,000 Bulgarians in (Greek) Macedonia and Thrace. Under the Convention of Neuilly, emigrants could take movable property duty free across the border, and the value of immovable property was to be reimbursed to emigrants upon liquidation. The States reciprocally agreed to facilitate these conditions by way of the Mixed Commission.

117. Whereas the Convention of Neuilly provided for complete reciprocity between States, the post-war Treaty of Neuilly provided for unilateral action against a defeated enemy. Upon liquidation, enemy property would be credited to the State of which the owner was a national 61/ and, in the case of Bulgaria, such credit was applied to the State's reparation obligations. Several authors noted at the time that the motives of the Treaty were actually political, rather than humanitarian: Greece took advantage of an opportunity to remove the Bulgarian minority from its territory and Bulgaria sought safeguards against unilateral actions of a neighbouring State. 62/

118. The actual degree of voluntariness in the subsequent emigration is subject to doubt, despite the wording of the agreements. When the Commission began its work in September 1921, the Bulgarians in Greece showed no desire to leave; meanwhile the Greek peasants in Bulgaria saw advantages in moving to

richer lands in Western Thrace while they faced potential expropriation under the new Bulgarian Land Reform Act. By June 1923, only 197 Greek families and 166 Bulgarian families had filed for emigration. Both Governments pressured the respective minorities, and the Commission had to "struggle, by measure of all kinds, to prevent forced emigration and to combat influences tending to boycott the Convention". 63/ Ultimately, the Commission itself came under severe criticism for its lack of legal qualifications and experience, as well as the debilitating antagonism which manifested itself between the two national delegates. 64/ None the less, the Commission was able to establish compensation terms. These, however, proved unsatisfactory.

119. The Commission's chief function was to determine eligibility, but in the context the ambiguities of language, "race" and religion made this task insurmountable. Citizens joined the transfer scheme in large numbers only after the failed Greek campaign in Anatolia (1923-1924). However, these "emigrants" were actually war-time refugees seeking a haven under the Convention.

120. The Greek Government deported Bulgarian residents from Western Thrace to Aegean islands and Thessaly for "military purposes" in 1923. Anatolian Greeks were transplanted into the Bulgarians' vacated homes, where they remained after the hostilities ended. Thus returning Thracian Bulgarians had little choice but to move to Bulgaria, as for the others who preceded them out of fear of deportation, or escaped the precarious economic and social conditions that accompanied the influx of surplus Greek labour from Anatolia. Correspondingly, Bulgarians from Thrace overran ethnic Greek villages in southern Bulgaria and, with the deterioration of relations between the two countries, the Commission had to conduct inquiries into the unrest in 1924. It ceased to accept further emigration requests, but these continued to remain low even after peace resumed. Between 92,000 and 102,000 Bulgarians left Greece and were compensated under the Convention (with 39,000-40,000 applying retroactively). According to the 1928 census of Greece, 82,000 Bulgarians still lived in that country (mostly in Western and Central Macedonia); thus, approximately 50 per cent of the Bulgarian minority declined to participate. 65/

121. The Peace Settlement at the end of the Greek-Turkish war of 1919-1922 differed from the Neuilly Treaty in that it made population exchange compulsory and set religion as the singular criterion for transfer. The Treaty of Lausanne 66/ formally exempted the Greek community in Constantinople and the Muslims of Western Thrace from forced removal.

122. Mutual hostility between the principal States pervaded the work of the Mixed Commission. It had failed utterly at the task of supervising compensation, while the respective Governments typically confiscated emigrants' non-movable property, often before a certificate of value could be obtained. Both Governments favoured cancelling the whole indemnification question. With the Convention of Angora, 67/ they deferred the matter to the neutral members of the Commission, who renounced the relevant provisions of the Convention and determined that compensation should be effected by the receiving States.

123. Transfer held numerous human rights implications for the emigrants, especially for the Orthodox emigrants. After confiscation of their property and arduous journeys to designated ports, the transferees were often detained or turned back to their original villages. Destitute, they fell victim to epidemics and starvation at the ports and, upon arrival at rural resettlement sites in Greece, League of Nations Health Section doctors had to join local physicians in stamping out new malaria and tuberculosis outbreaks. Urban resettlement proved even more problematic, at least in the short term, given the economic strains attendant to a flood of surplus labour. Various studies reported that from 30 to 40 per cent of immigrant settlements still depended on State subsidies in 1928. However, many of these communities were reportedly prospering by the end of the decade.

124. The financial strain on Greece was great and repayment of external debt 68/ to finance the immigration placed a heavy burden on Greek taxpayers. The Turkish Government had an easier task: resettlement of a relatively smaller number was financed internally. 69/

125. A total of 355,635 Muslims had left Greece by 1924. Some 189,916 Orthodox were moved from Anatolia after the Convention was signed, but over a million Greek Orthodox refugees had already migrated to the Greek State between 1912 and 1923. From the Greek perspective, the Convention essentially recognized a fait accompli. For Greece, according to one source, "the undeniably advantageous economic development of the country and the attainment of ethnical homogeneity was achieved at the expense and great hardship to her and financial embarrassment to her Government". 70/

126. For the most part, Turkey correspondingly eliminated its indigenous Orthodox minority and concentrated more Muslims in metropolitan Turkey. Turkey continued to encourage Dış Türkler (outside Turks) to immigrate to Anatolia, particularly from Bulgaria and Romania, and signed an agreement with Romania for the immigration of 67,000 Turkish speakers from Dobruja in 1936-1937. 71/

127. In Soviet practice, the right of option resulting in population exchange arrangements was exercised with regard to citizens of States emerging from the former Russian Empire, as well as those living in Soviet annexed territories. Such terms formed part of agreements there following the First World War. 72/ Although ethnic identity and marriages were often mixed, nationality customarily was determined for families by the head of household, according to international practice of option. While it could be inferred here that citizenship corresponded to an ethnic criterion, that would have contradicted Soviet principles at the time and it is doubtful that these agreements constitute the establishment of a new international legal concept of "race"-based civil status.

B. In the context of the Second World War

128. Germany had emerged as the principal protagonist of transfer agreements in Europe by the end of the 1930s, implementing the ingathering of ethnic Germans (Volksdeutsche) under bilateral treaties with the Baltic States, Italy, Romania, Yugoslavia and Bulgaria. War provided the impetus for the Third Reich to conclude an agreement with the Soviet Union to "repatriate"

German and Russian populations in the former Poland to their respective "mother countries". 73/ The failure of the Minorities Treaties and the ensuing war provided an air of acceptability for the concept of compulsory transfer in Europe as a solution to social and political problems related to ethnicity.

129. Following Adolf Hitler's policy of Umsiedlung (resettlement), Benito Mussolini actually instigated the Italo-German agreement on obligatory transfer of the Reichsdeutsche (expatriate German citizens) and the voluntary transfer of Volksdeutschen (ethnic Germans) to the Reich from the Süd Tirol, a territory ceded to Italy from Austria in the Treaty of St. Germain of 1919. 74/ Reichsdeutsche in Italy were given three months to move and Volksdeutsche were to "opt freely and spontaneously" to emigrate as automatic German citizens by 31 December 1942 or to remain in Italy. Nazi sources claimed a plebiscite indicated 73 per cent of Süd Tirol Volksdeutschen opted for Umsiedlung, although reports six months earlier showed local opposition to the plan. 75/ Official Nazi sources give the number of transferees as 237,802, including at most 10,000 Reichsdeutsche. 76/ However, these numbers are probably not reliable. 77/

130. The compensation terms under this agreement are obscure; disagreements between the States on assessments varied wildly, 78/ but a compromise was apparently reached with Italian properties in newly German-occupied territory serving as partial payment. 79/ The disposition of the migrants is largely unknown; however, indications are that physical facilities in resettlement were less than adequate. 80/ Their destination is also obscure, but some reportedly infiltrated into Bohemia and Moravia, while others were implanted in western Poland with German transferees from the Baltics. In 1942, Heinrich Himmler, SS Reichsführer and director of Umsiedlung, urged that the Süd Tirol transfers be expedited for resettlement in Luxembourg, Lorraine and East Sudetengau. 81/

131. Agreements to "repatriate" Germans were concluded with Estonia and Latvia, too, by 1939. 82/ Some 62,144 German inhabitants of Latvia 83/ and 16,000 of Estonia, descendants of German colonizers of the Middle Ages, were to be moved to German-held territory in former western Poland. Before the agreements, this prosperous community showed no desire to move. Rumours of a secret Soviet-German pact to remove German influence from the Soviet sphere of the Baltics were denied by the Soviet Government, 84/ but the Reich rationalized the exchange on the grounds of improved future relations between the Powers in the region. Further, the Reich was to gain financially from compensation paid for immovable German properties. 85/ The removal of this minority in the Baltics would mean the termination of German schools and institutions. The transfers, with restrictive nationality criteria, 86/ were carried out within three months of the conclusion of the Agreements, and very few opted to stay behind. 87/ The bulk of the transferees "released" from Baltic citizenship were resettled in the Incorporated Territories of western Poland, Upper Silesia and East Prussia, while the Polish inhabitants of these areas were ruthlessly expelled.

132. With the Baltic States having then been incorporated into the Soviet Union, a secret agreement between the Reich and Soviet Governments on 10 January 1941 called for the transfer of (mostly peasant) Germans in

Lithuania and induced the remaining Baltic Germans to leave. 88/ Some 50,471 were transferred in the following spring to the Incorporated Territories, but most from Lithuania were forced to return in the following year as they were belatedly determined not to be ethnic Germans at all, but Lithuanians preferring to leave Soviet rule. Under the same agreement, 21,343 persons opted for resettlement in the Soviet Union.

133. Among the previous and subsequent exchange agreements in the context of war, these Baltic exchange protocols form a category in themselves in that they involved no territorial changes. By 1942, 56,721 Baltic Germans were implanted in the Incorporated Territories.

134. The three German-Soviet agreements of 1939-1941 were a sequel to the partition of Poland and the incorporation of Baltic States, Northern Bukovina and Romanian Bessarabia. 89/ The agreement of 3 November 1939 involved the "repatriation" of 100,000 (mostly peasant) Germans 90/ from the Soviet-held provinces of Poland, who emigrated with few possessions in the dead of winter 1940 into the German Incorporated Territory. Some 30-40,000 Ukrainians and Byelorussians likewise emigrated to former eastern Poland in exchange. The actual agreements remained secret, but an outline was later published, emphasizing the voluntary nature of the transfers. 91/

135. In 1940, the Romanian Government acceded to the Soviet demand for the secession of Bessarabia and Northern Bukovina, and a Soviet-German agreement for the Umsiedlung of 137,116 ethnic Germans there was concluded, under unpublicized terms. 92/ It is assumed that this agreement also included an option clause. The option provisions of the Soviet-Romanian Agreement are unclear, but it seems that Romanians in those territories did not have the option to emigrate to Romania. 93/ Only ethnic Germans moved out under option provisions by virtue of Germany's involvement as a deus ex machina, without Romania's participation, and the Soviet Union shouldered the cost of compensation for properties left behind.

136. South Bukovina Germans were transferred to the Reich beginning two months after an agreement between Germany and Romania was announced. 94/ Further exchanges took place in the Balkans after the beginning of the War. Romania and Bulgaria agreed on the secession of South Dobruja to Bulgaria 95/, to include the exchange of some 62,000 Bulgarians and 110,000 Romanians. Germany dictated the terms of the Vienna Award of 30 August 1940, which provided for resettlement options for Hungarians and Romanians from ethnically mixed Transylvania, more than half of which was ceded to Romania. Approximately 130,000 had emigrated from Transylvania, and 202,233 had immigrated there by April 1943. Some 17,614 Hungarians from Bukovina, Bosnia and Moldavia had emigrated to Hungary by the end of 1942. 96/

137. Other treaties and agreements each involved smaller numbers of transferees, but added significantly to the overall numbers of transferred population during the Second World War. 97/ It must be remembered that these figures represent only a fraction of the people affected by war, omitting the numbers of refugees, deportees and other displaced people whose numbers were not documented and who were not subject to "option clauses" as a factor in their flight. Furthermore, considering the circumstances of the War and the overriding interests of State-motivated transfer, it is unlikely that

most transferees moved as much out of will as out of desperation and fear. In most cases, their community infrastructure and the fragile confidence in their rights to minority protection evaporated with each bilateral "option agreement". Certainly in these cases, voluntariness is a relative term.

C. Post-war transfers

138. The outcome of the Second World War involved, inter alia, the alteration of State boundaries in Europe. The victorious Allies at Potsdam interpreted the laws of war as ceasing to have effect once Germany was completely subjugated (debellatio). 98/ Before the signing of a peace treaty, approximately 16 million German civilians were put to flight or expelled from their homes, mostly between 1944 and 1949, with the purpose of transferring them within the borders of the post-war German States. It is ironic that, in respect to Hitler's Heim-ins-Reich policy, the population-transfer objectives of the Third Reich were realized by the preferences of the victorious Powers, albeit at great hardship to the German people. Some 2 million perished in the process.

139. Legal scholars and experts differ as to the legality of this transfer following debellatio. 99/ Under the prohibitions on war of the Charter of the United Nations (art. 2.4), a debellatio situation is theoretically impossible today among member States. However, these prohibitions have not proved to be effective in fact, and it would therefore be imprudent to assume that an illegal war would never again result in such "reparations in kind". 100/

140. In addition, post-war exchanges include a compulsory exchange of 200,000 Magyars from Czechoslovakia and 200,000 Slovaks from Hungary between those two countries, in 1946. 101/ Also, a September 1946 agreement provided for the exchange of 10,000 Magyars and 40,000 Serbs and Croats between Yugoslavia and Hungary, and the Soviet Union likewise agreed further to exchange populations with Poland and Czechoslovakia. 102/

141. Between one and two million transferees are estimated to have died under conditions of both formal population exchanges and spontaneous flight occasioned by the 1947 partition which created India and Pakistan. 103/ Among the exchanges were many civilians who were forced across borders by events including refugees who were compelled to escape religious persecution in their home countries. The New Delhi Accord between India and Pakistan 104/ sought to regulate the movement of 10 million Hindus and Muslims to India and Pakistan, respectively. However, in the chaos which accompanied these exchanges, the Accord served merely as a formal recognition of a fait accompli, not as evidence of the use of law to enforce transfer. Such exchanges, having some degree of voluntariness and arguably in the interest of eliminating the source of foreseeable interethnic conflict within independent States, involve a tragic human rights trade-off which deserves deeper study to guide future practice and provide better protection. In these ethnic conflicts, particularly in the shadow of inter-State war, State force has been used to expel minority populations to the degree that legal experts have charged responsible Governments with gross violation of human rights and crimes against humanity. 105/

VI. PRINCIPLES AND RULES IN EXISTING INTERNATIONAL STANDARDS APPLICABLE TO POPULATION TRANSFER

142. Population transfers occur under varying circumstances ranging from aggressive wars, during belligerent occupation, in internal conflicts, or in peace-time, and may include removal as well as settlement of persons, within or across the boundaries of a State. No single legal principle can be applied to all population transfers. Dependent on the unique circumstances of each population transfer and the various groups it affects, different legal standards and principles may apply. The following section attempts to provide a comprehensive overview of existing and emerging legal standards relevant to population transfers in peace-time, as well as in situations of international or internal armed conflict.

143. A logical starting point for this analysis may be to look at some of the provisions of the Charter of the International Military Tribunal of Nuremberg, as well as the deliberations and judgement of the Tribunal regarding the forcible transfers of people that took place during the Second World War.

A. London Charter of the International Military Tribunal and the Nuremberg judgment

144. The earliest explicit mention of population transfer in an international legal document was the recognition of "forced resettlements" as a war crime in the Allied Declaration on German War Crimes, adopted by representatives of the nine occupied countries, exiled in London, in 1942. It stated, inter alia:

> "With respect to the fact that Germany, from the beginning of the present conflict, has erected regimes of terror in the occupied territories ... characterized in particular by ... mass expulsions" 106/

145. On 17 October 1942, the Polish Cabinet in Exile issued a decree on the punishment of German war crimes committed in Poland, which provided that life imprisonment or the death penalty would be imposed "if such actions caused death, special suffering, deportation or transfer of population". 107/

146. In reaction to the abundant and flagrant violations of the laws and customs of war during the Second World War, the International Military Tribunal (IMT) was set up to try the principle war criminals. The IMT Charter introduced into international law the notions of crimes against the peace, war crimes and crimes against humanity. It defined "war crimes" as follows:

> "Murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory ..." 108/

147. Article 6 (c) of the Charter defined "crimes against humanity" as:

> "Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war ... in execution of or in connection with any crime within the jurisdiction of the Tribunal ..." 109/

148. The notion of "crimes against humanity" differs from war crimes in that crimes against humanity can be committed before, as well as during, a war and against any population, including the perpetrator's own population.

149. In addition to the four Powers which approved the IMT Charter, 19 other States acceded to it as well. Furthermore, the United Nations General Assembly affirmed the principles of international law recognized by the IMT Charter and reflected by the judgement of the Tribunal. 110/

150. The Nuremberg judgment dealt in various instances with the practice of displacing civilians from the occupied territories and replacing them by German colonists. For example, count 3, section J of the judgement states:

> "In certain occupied territories purportedly annexed to Germany the defendants methodically and pursuant to plan endeavoured to assimilate these territories politically, socially and economically into the German Reich. They endeavoured to obliterate the former national character of these territories.
>
> "In pursuance of their plans, the defendants forcibly deported inhabitants who were predominantly non-German and replaced them by thousands of German colonists." 111/

151. During the trials the practice of "Germanizing" or "Nazifying" occupied or "annexed" territories by deporting or expelling the original population and moving in German settlers was addressed and repeatedly condemned. 112/

152. In conclusion, the Nuremberg judgment held that population transfers and colonization in occupied territory constituted both a war crime and a crime against humanity, 113/ and that deportation of persons was illegal.

B. Humanitarian law

153. International humanitarian law refers to the body of law concerning the protection of individuals in time of war. Generally, the Hague Conventions of 1907 determine the rights and duties of belligerents in the conduct of war, while the Civilians Convention of 1949 concerns the protection of persons not taking part in hostilities. 114/ Humanitarian law is applicable during international armed conflict, although some clauses contain minimum standards in cases of internal conflict. According to most opinions today, the provisions of the Hague and the Geneva Conventions constitute customary international law. The Additional Protocols of 1977 to the Geneva Conventions of 1949 have not been universally ratified, 115/ but a number of their provisions are today generally accepted as constituting customary international law. 116/ Humanitarian law is of particular importance to the current study as it regulates many forms of population transfer in times of conflict.

1. The Hague Conventions

154. The Hague Convention IV concerning the Laws and Customs of War on Land, as originally adopted in 1899 and revised in 1907, constitutes a comprehensive codification of the conduct of land warfare. But it does not contain explicit

mention of the practice of population transfers. Dr. Jean Pictet offers one explanation for this omission in his commentary to article 49 of the Civilians Convention, where he explains that "this was probably because the practice of deporting persons was regarded at the beginning of this century as having fallen into abeyance". 117/ He adds that the prohibition of deportations "may be regarded today as having been embodied in international law". However, articles 42 to 56 regulating situations of belligerent occupation offer implicit protection against population transfers. For instance, article 43 requires an Occupying Power to respect the laws in force in a country and article 46 requires respect for, inter alia, private property. 118/

155. Deportations were already prohibited under article 23 of the Lieber Code, which influenced the drafting of the Hague Conventions and the development of its provisions into customary international law. Article 23 provides that "private citizens are no longer murdered, enslaved, or carried off to distant parts ..." 119/ The International Military Tribunal at Nuremberg expressly recognized the 1907 Hague Convention IV as declaratory of customary international law. 120/

2. Interwar agreements: Kellogg-Briand Pact, Stimson doctrine

156. The interwar period witnessed a number of developments of relevance to the issue of population transfer. The Covenant of the League of Nations, signed in 1919, contained a partial prohibition of war. In an attempt to achieve a total prohibition of war, the Kellogg-Briand Pact was concluded and signed in 1928. The General Treaty for the Renunciation of War, to which nearly all States of the world at that time acceded, 121/ stated:

> "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."

157. The Kellogg-Briand Pact provided the basis for reconciliation and arbitration as the alternative to military aggression. However, not providing for specific action by States, the Kellogg-Briand Pact proved ineffective as a measure against military conquest. By the Stimson Note of 1932, the United States Government announced a further measure: not to recognize any situations brought about by aggression. The League of Nations adopted the Stimson formula of non-recognition in 1933.

158. Clearly a war of aggression was illegal after the Kellogg-Briand Pact and evidence exists from that time deeming aggression a crime under customary international law. 122/ The relevance to population transfers of the non-recognition of aggressive wars as a means of acquiring territory is that in the past conquest conferred title to territory and the conqueror would then often populate the territory with its own settlers. Large-scale expulsions and population transfers accompanied and followed aggressive wars, also at the beginning of this century.

159. Transfers resulting from war or belligerent occupation may be illegal and subject to remedy and/or compensation on the basis of the legal landmark

provided by the Stimson Note of 1932. Thus, in the interest of legal clarity and practicality, the date of that standard may serve as a cut-off point, such that victims of transfers preceding that date would not be able to seek remedy under international criminal law.

160. By the end of the Second World War, the view had evolved that an obligation of non-recognition rests on States where another State has acquired territory by force. This culminated in the prohibition in the Charter of the United Nations of the use of force, whether or not constituting a technical state of war, against the territorial integrity or political independence of another State, except in self-defence or with the authority of an organ of the United Nations (art. 2.4,. By the time the Charter was signed, it had become clear as well that illegal acts, such as transfer of population by expulsion or settlement, carried out during annexation following aggression, would remain illegal. 123/

3. Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (1949) and Additional Protocols I and II (1977)

161. The indignity and large-scale human suffering experienced during the Second World War inspired the further development of humanitarian law and the inclusion of new and crucial principles in Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (Civilians Convention).

162. The horrors connected to the mass deportations and transfers which took place during the War directly resulted in the inclusion of the explicit prohibition of forcible transfers or deportations in the Civilians Convention, 124/ which is devoted exclusively to the protection of civilians in the territory of the enemy. In article 49 "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory ... are prohibited, regardless of their motive". The prohibition is absolute, apart from the exceptions stipulated in paragraph 2, which authorizes the Occupying Power to evacuate an occupied territory wholly or partly, but only if "the security of the population or imperative military reasons so demand".

163. Protected persons are to be brought back to their homes as soon as the hostilities in the area have ended. 125/ Article 49 further prohibits the occupying Power to "deport or transfer parts of its own civilian population into the territory it occupies". 126/ There is no exception clause to this last prohibition.

164. Although article 49 was drafted with the intention to prohibit and thereby prevent population transfers in times of armed conflict, at the same time it sanctions such transfers when "imperative military reasons so demand". Through inclusion of the exception clause based on imperative military reasons, the principles contained in article 49 can just as easily be used to give forced removals a legal basis as to protect the rights of potential relocatees. The breadth with which "imperative military reasons" could be interpreted leaves doubt as to the de facto protection this article might

provide. None the less, the basic guarantee contained in this provision is the clear and unambiguous prohibition of individual and mass forcible transfers. 127/

165. Invocation of the exception clause by States to justify practices of population transfer contrary to the prohibition contained in article 49 may, however dubious at times, nevertheless contribute to strengthening its claim to customary law status.

166. The Regulations, annexed to The Hague Convention IV, in particular their provisions concerning the treatment of civilians, provide the basis for the customary law content of a large number of the guarantees contained in the Fourth Geneva Convention. 128/ Article 49, however, has no antecedents in The Hague Regulations. As to its status, Theodor Meron comments:

> "At least the central elements of article 49 (1), such as the absolute prohibitions of forcible mass and individual transfers and deportations of protected persons from occupied territories ... are declaratory of customary law, even when the object and setting of the deportations differ from those underlying German World War II practices which led to the rule set forth in article 49. Although it was less clear that individual deportation was already prohibited in 1949, I believe that this prohibition has by now come to reflect customary law." 129/

167. Article 49 is applicable in situations characterized as international armed conflicts, including belligerent occupations. In situations of prolonged occupation, even after military operations have ceased, population transfers would still be prohibited under article 49, read in combination with article 6, which extends the application of a number of provisions of the Civilians Convention, including article 49, for "the duration of the occupation, to the extent that such Power exercises the functions of government in such territory".

168. In situations of non-international armed conflict, a prohibition of population transfers could be inferred from article 3 common to all the Geneva Conventions of 1949, which, although not explicitly mentioning population transfer as such, enshrines a minimum humanitarian standard of treatment for protected persons, including the prohibition of "violence to life and person" and "outrages upon personal dignity, in particular humiliating and degrading treatment".

169. In accordance with article 147 of the Civilians Convention, "unlawful deportation or transfer of protected persons" constitute grave breaches of the Convention, perpetrators of which the High Contracting Parties are under obligation to pursue and punish before their own courts. Each State is obliged to enact legislation to provide for punishment of any person who has committed such a grave breach, regardless of nationality or place the offence has been committed. 130/

170. The development of new methods of conducting war, the experience in armed conflicts showing the shortcomings of the existing Conventions and contemporary developments in human rights law gave impetus to the further development of humanitarian law. In 1977, two Additional Protocols were

added to the Geneva Conventions of 1949. Additional Protocol I supplements the protection in situations of international conflict by extending its application to include situations "of armed conflict in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination". 131/ Protection against practices of population transfer is further extended by article 85 of Protocol I, which, inter alia, provides in paragraph 4 that:

> "In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or Protocol: (a) the transfer by the Occupying Power of its own civilian population into the territory it occupies, or the deportation or transfer of all parts of the population of the occupied territory within or outside of this territory, in violation of article 49 of the Fourth [Civilians'] Convention."

171. Article 85, paragraph 5 of Protocol I provides that "grave breaches of these instruments shall be regarded as war crimes". Article 86 implements article 85 by imposing on parties to the conflict an obligation to repress grave breaches.

172. Article 85, paragraph 4 (c), referring to transfers of population into or away from a certain territory does not lay out particular consequences as constitutive requirements for a grave breach to occur. The main emphasis of this clause is on the transfer by an Occupying Power of parts of its own civilian population into the territory it occupies. This constitutes a breach under the Civilians Convention, but is now a grave breach under the Protocol, according to one commentary, because of the possible consequences for the population of the territory concerned from a humanitarian point of view. 132/

173. Article 86 provides for the criminal responsibility of those who have failed in their duty to act. One obvious duty to act consists of taking appropriate measures to prevent breaches of the Conventions or Protocols from occurring. A failure by the occupying Power to prevent movement and settlement of its own civilian population in an occupied territory may thus amount to a breach under the Additional Protocol I. Articles 85 and 86 are generally held to constitute customary international law.

174. Additional Protocol II to the Geneva Conventions applies in particular situations of internal conflict, and requires a certain degree of territorial control on the part of the organized armed group fighting the State. 133/ Article 17 provides that:

> "The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand."

175. The wording of this provision is based on article 49 of the Civilians Convention. Its inclusion fills the gap in protection against forced displacement in non-international armed conflicts, a situation in which the

need for such protection is particularly acute. From expert commentary we learn that the adjective "imperative" in "imperative military reasons" reduces to a minimum the cases in which displacement may be lawfully ordered. 134/ The commentary continues:

> "Clearly, imperative military reasons cannot be justified by political motives. For example, it would be prohibited to move a population in order to exercise more effective control over a dissident ethnic group."

176. Article 17 of Protocol II provides that no displacement shall take place for reasons "related to the conflict", leaving open the possibility that transfer may be imperative in certain cases of epidemic or natural disaster, such as floods or earthquakes. 135/

177. As to its status in international law, Protocol II has been recognized as containing core rights, some of which have already been recognized as customary in international human rights instruments. In this context, the International Committee of the Red Cross commentary on Protocol II states that it:

> "contains virtually all the irreducible rights of the Covenant on Civil and Political Rights .... These rights are based on rules of universal validity to which States can be held, even in the absence of any treaty obligation or any explicit commitment on their part." 136/

178. Other authors have taken a more cautious view and concluded that most of Protocol II has to be regarded as confined to treaty law in the absence of more substantial State practice providing evidence of acceptance of its provisions into customary law. 137/

4. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 138/

179. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity is relevant to the legal discussion concerning population transfers as it extends the concept of war crimes and crimes against humanity as defined by the Charter of the Nüremberg Tribunal. It also embodies the principle that no statutory limitations shall apply to the crimes referred to in the Convention, "irrespective of the date of their commission". 139/ In accordance with article 1 (b) of the Convention the following acts are to be included as crimes against humanity:

> "Eviction by armed attack 140/ or occupation and inhumane acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed." 141/

180. Furthermore, article 1 (b) specifies that crimes against humanity may be committed "in time of war or in time of peace", thus delinking it from the ambiguity of article 6 (c) of the Charter of the Nüremberg Tribunal, which could be interpreted as not extending to the same category of crimes committed in time of peace not followed by war.

181. Article 2 stresses that inaction, as distinct from active involvement, on the part of the State authorities in not preventing the commission of international crimes is sufficient to bring those persons within the ambit of the Convention.

182. It deserves mention that the preamble to the Convention refers explicitly to resolutions of the General Assembly condemning as a crime policies which violate the economic and political rights of the indigenous population by the settlement of foreign immigrants on their territory, 142/ demonstrating particular consideration of the detrimental aspect of the implantation of settlers as part of a policy of population transfer that is deemed a crime under the Convention.

C. Human Rights Law

183. Although there currently exists no clear single code specifically outlawing population transfer or regulating its outcome, nor the recognition of a distinct right of individuals and groups not to be subjected to population transfer, many cases of population transfer are in breach of customary and conventional humanitarian law and constitute a violation of basic principles of conventional and customary international and human rights law. Under customary international law, the relevant categories of unlawfulness are genocide, systematic discrimination, a consistent pattern of gross violations of internationally recognized human rights and interference with the right to self-determination. 143/

184. The law on genocide and the principles of non-discrimination and self-determination are considered overriding principles of international law, forming a body of jus cogens, obligations towards the international community as a whole that cannot be set aside by treaty or acquiescence, but only by the formation of a subsequent customary rule with the contrary effect. 144/

185. To estimate the existence of normative rules prohibiting such transfers or relevant to their application or consequences and to assess whether existing legal principles afford adequate protection against population transfers, in this section a number of principles and instruments of international law will be analysed in the light of the continuing practice of population transfer.

1. Charter of the United Nations

186. The Charter of the United Nations sets out fundamental principles which, at the time of its writing, were considered to be essential for the maintenance of peace and world order, including respect for human rights. The Charter affirms not only negative rights, prohibiting violations against persons and peoples, but also positive rights, as in the provision in Article 55 that "the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development". This important article also binds the United Nations to "universal respect for, and observance of, human rights and fundamental freedoms for all" (subpara. c.). Article 56 states that "all Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55".

187. Whereas these provisions are binding on Member States, they may be found in some jurisdictions not to be self-executing and, therefore, insufficient as a basis of relief for individual plaintiffs. 145/ However, as treaty provisions applying to the Organization and all its Members, these principles have remained paramount and, especially with the strength of Article 56, the political and judicial bodies within the United Nations system have affirmed respect for human rights as a legal obligation. 146/

188. As a fundamental instrument of international treaty law, the Charter and its general human rights principles have served as an authoritative guide and impetus for the development of more specifically defined standards of human rights law. Of all the legal and practical innovations of the Charter, perhaps the most influential and constructive have been the prohibition of discrimination and the concept of the self-determination of peoples, as States Members of the United Nations are obliged to respect and realize these fundamental principles in the interest of international peace and world order.

2. The standard of non-discrimination

189. The Charter contains a number of general references to human rights and fundamental freedoms that are to be realized for all "without distinction as to race, sex, language or religion". 147/ These have provided the basis for more specific provisions found in a host of multilateral treaties emerging after 1945. Standards of human rights, including non-discrimination, became further codified with the human rights covenants and other developments in the mid-1960s. By 1965, the principle of non-discrimination was upheld by international jurisprudence as a legal standard, 148/ and a majority of judges on the International Court have referred to obligations erga omnes in contemporary international law that include "the principles and rules concerning basic rights of the human person, including protection from slavery and racial discrimination". 149/

190. The legal principle of non-discrimination in matters of race is further confirmed in the practice of the organs of the United Nations. Supplementing Articles 55 and 56 of the Charter, the General Assembly resolutions condemning apartheid, 150/ the Universal Declaration of Human Rights, the international covenants on human rights and the International Convention on the Elimination of All Forms of Racial Discrimination, among other treaties and declarations, 151/ have affirmed non-discrimination as a universal principle of human rights. Discrimination on the basis of gender is also condemned by multilateral agreements, such as the Discrimination (Employment and Occupation) Convention 152/ and the Convention on the Elimination of All Forms of Discrimination against Women. 153/ The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 154/ also complements the legal prohibitions against discrimination.

191. Under international law as developed, the treatment of aliens is subject to different standards. For example, asylum issues, confiscation of property, taxation and some commercial practices may involve measures of differentiation, but if the standard of discrimination is jus cogens, as in the case of racial discrimination, or if the treatment involves a pattern of unreasonable differentiation or arbitrariness, it may be unlawful. Relevant

to population transfer, the expulsion of non-citizens may be lawful in some cases, unless the action is arbitrary or specifically targets a distinct population group.

3. International Convention on the Elimination of All Forms of Racial Discrimination

192. As pointed out in the second progress report on the protection of minorities 155/ and discussed above, a number of political solutions are available to States faced with problems arising from a plural society. Such policy options may be restricted by the most widely ratified human rights instrument in legal history, the International Convention for the Elimination of All Forms of Racial Discrimination (the Racism Convention). 156/

193. Under this Convention, States are obliged to observe principles of equality, non-dominance and non-discrimination. In order to carry out these obligations, the Convention also empowers States to take certain legislative and other measures to enforce individuals and public bodies within its jurisdiction not to discriminate on the basis of race.

194. Despite its inclusive title, the Convention concerns itself not so much with the predisposition of mind that is racism, but rather with the outward manifestations of racism that involve the expression or practice of discrimination based on race. It defines its subject to mean:

> "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (art. 1.1).

However, the Racism Convention does not apply to distinctions or discrimination made by a State party between citizens and non-citizens, nor to legal provisions concerning naturalization (art. 1.2), as long as those State laws and practices do not discriminate against any particular nationality (art. 1.3).

195. Article 5 of the Racism Convention recognizes an array of specific rights, including the political right to participation "in the conduct of public affairs at any level and to have equal access to public service". Among the human rights specifically recognized are the right to own property alone or in association with others, and therefore to control the disposition of that property. The Convention refers to the right to housing, which has been elaborated elsewhere to mean not only adequate shelter, but in its broad sense to guarantee a place to live in peace and dignity, and the right to decide the development of that place in ways that the owners and resident communities themselves determine. 157/ Violations of the right to housing often involve the use of official housing policies as an instrument of discrimination, which exemplifies the conceptual and practical intersection of planning and population transfer, most typically at the expense of the indigenous inhabitants of a territory. 158/

196. Also provided in article 5 is the basic right to nationality. Public international law has developed in such a way that the status of the individual derives from a relationship to the State, as well as to a particular territory. The doctrine of effective nationality relies on a number of important treaties and some municipal laws which recognize habitual residence or domicile. 159/ The underlying idea here is the importance of belonging to a community, and that a stable community relates to a particular territorial zone. Thus, a population has a local, "territorial" status, and State sovereignty implies responsibilities toward the people(s) (communities) related to the place coinciding with the State. Hence, the principle of local status related to the right of nationality, consistent with other human rights instruments, would preclude the transfer of persons or communities as a violation of that basic right guaranteed by the Racism Convention.

197. States are empowered under international treaty law to restrict the offensive behaviour of their citizens and public bodies "with due regard to the principles embodied in the Universal Declaration of Human Rights". In practical application of the Racism Convention, this "due regard" clause is generally interpreted to require weighing the State's obligation to restrict "incitement" and expressions of racial discrimination with articles 19 and 20 of the Universal Declaration regarding freedom of expression and association.

198. Affirmative action to correct the consequences of discrimination are called for in the Racism Convention, which provides in article 2.2 that, when circumstances warrant, States shall take "special and concrete measures" in the social, economic, cultural and other fields:

> "to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms".

Affirmative measures may be limited only in so far as they "in no case entail as a consequence unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved". That is, remedies for past discrimination are called for under the Racism Convention as long as they do not create new, permanent privileges in the long run at the expense of other groups.

199. Where transfers that took place before 1932 have led to a continuing pattern of discrimination at the expense of a group subject to the provisions of the Racism Convention, formal measures are called for whereby States Parties retroactively address the effects of that discrimination.

4. The principle of self-determination

200. The principle of self-determination is one of the most fundamental, widely supported and debated collective rights recognized in international law. 160/ Contemporary views hold the right to self-determination to constitute jus cogens, customary international law and a continuous right, 161/ appertaining to all peoples 162/ to "freely determine, without external interference, their political status and to pursue their economic, social and cultural development." 163/ The right to

self-determination has been argued to be a process rather than one particular outcome 164/ and to consist of a "bundle of rights" from which, depending on the specific situation experienced by that people, a variety of rights can be chosen for its implementation. 165/ The exercise of the right to self-determination involves a range of political options, ranging from mere self-identification to self-government and secession or independent statehood.

201. As Ian Brownlie instructs, "the rights and claims of groups with their own cultural histories and identities are in principle the same - they must be. It is the problems of implementation of principles and standards which vary, simply because the facts will vary". 166/

202. Policies and practices of population transfer may be aimed specifically at denying a meaningful implementation of the right to self-determination, for instance, by altering the relevant unit of self-determination through demographic manipulation, or policies which have that effect. Instances include the implantation of settlers and settlements in occupied or disputed territories and the concurrent, induced dispersal of the original inhabitants, changing the demographic compositions of the territory to extend control or annex the territory, thereby undermining a legitimate exercise of self-determination by its people.

203. As the core content of the right to self-determination encompasses the right to exist as a people and safeguards the cultural and political continuation of groups, its exercise would necessarily be frustrated if a population were uprooted from its homeland 167/ and when transfers contribute to the destruction of a distinct identity and remove a people's ability to determine their own destiny as a people. 168/

204. The forced removal of people away from their traditional lands, or the implantation of settlers without the consent of the original inhabitants into whose territories they are being moved, for instance, are instrumental to assimilationist policies and constitute obvious breaches of the minimum guarantee which the right to self-determination is accepted as conferring: the right of a people to "freely determine" its destiny.

205. It has been contended that "a likely consequence of analysing self-determination in the context of population transfers is recognition that a right to the homeland and a right not to be demographically manipulated are prerequisites of self-determination". 169/ In addition to conflicting with the right to self-determination, in general, practices of population transfer may be instrumental in or have the effect of denying a meaningful realization of core elements of the right to self-determination. Without attempting to provide an exhaustive overview of the interaction of population transfer policies with the different levels of this right, a few exemplary connections will be noted.

206. The exercise of the right of peoples to self-determination presupposes the free and genuine expression of their will, 170/ such as by means of elections or a plebiscite. However, in a situation where a settler population has become a majority in a certain territory through policies of induced settlement in combination with displacement of the original population, exercise of democratic rights by that majority determines the outcome of the

election and renders the concept of "genuine expression of their will" an empty promise for the original inhabitants. 171/ In a number of recent situations, States have attempted actively to utilize population transfer policies to influence the outcome of referenda by altering the demographics of the region concerned.

207. For many peoples, implementation of their right to self-determination focuses on recognition and retention of land rights. For the majority of indigenous peoples, survival of their cultural and national identity, preservation of their unique way of life and spiritual heritage, political autonomy and economic self-sufficiency depend on the possibility of living on their traditional lands and controlling the use and exploitation of their natural resources. Loss of land threatens their very existence. Population transfer schemes, including the removal of people and the encouragement of settler encroachment, for instance, carried out under the banner of "development", "modernization" or military imperatives, are among the principle means by which indigenous land is appropriated. Population transfer policies may thus threaten a people's most basic means of subsistence, a crucial element of the right to self-determination.

208. The right to use one's own language may constitute another key element around which people's claims for self-determination are centred, when the use of their language has been denied them as part of a consistent policy. Coincidentally, linguistic criteria have been used as a basis for population transfer policies, allowing persons whose mother tongue is not that of the dominant society to be displaced, resettled and dispersed. 172/

5. Convention on the Prevention and Punishment of the Crime of Genocide

209. In close connection with the development of humanitarian law, new rules of international human rights law were formulated. The concept of crimes against humanity led to the adoption in 1948 of the Convention on the Prevention and the Punishment of the Crime of Genocide (the Genocide Convention). Its main purpose was to make genocide a crime under international law. 173/

210. In its Advisory Opinion, the International Court of Justice stated that "the principles underlying this Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation". 174/ Although the Convention does not prohibit population transfers *per se*, its relevance to practices of population transfer becomes obvious when one considers its definition of genocide. In article II, genocide is defined as including:

> "any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures to prevent births within the group;

(e) Forcibly transferring children of the group to another group".

211. Several cases of transfer in the present century have been reported to involve any one, or combination, of these categories. For example, the policy of transferring some 650,000 Baltic people from their countries to other points within the former Soviet Union between 1941 and 1952 reportedly also involved the systematic separation of Baltic children from their families to be raised in an alien culture. The apparent pattern of transfer and forced labour in work camps in Trans-Ural Siberia, Kirgizia and elsewhere under life-threatening conditions may relate to a combination of the five definitions of genocide provided in the Covenant. 175/

212. The prohibition of genocide corresponds to a right of peoples to physical existence. 176/ Practices of population transfer may threaten the physical existence of a people, for instance in the case of removal of land-based communities from their traditional lands or the implantation of settlers in occupied or annexed territories as a means of changing the demographic composition of those territories.

213. The traumatic experience of involuntary removal, often under inhumane circumstances and being compelled to leave everything behind, may lead to serious bodily and mental harm and indeed in the death of large numbers of people. Uprooting of peoples with special ties to the land has proved most expedient to their physical destruction. When removal of people or the implantation of settlers is accompanied by more obvious measures of physical destruction vis-à-vis that particular group, such as forced abortions, prohibition of the use of an original language, national customs and religion, imprisonment, killings and torture, the connection of population transfers to genocide becomes most evident. 177/

214. For specific policies and practices of population transfer to constitute genocide under the Convention, in addition to the destructive effects of the transfer, the intent of the Government or other actor "to destroy, in whole or in part, a national ethnic, racial or religious group as such" must be sufficiently proved. The governmental intent required to raise the level of an act to genocide will vary, depending on circumstances. Governmental participation in population transfers may differ, from the outright conducting of the transfers to encouragement and inducement of certain movements of people, or to a general failure to act to halt ongoing and "spontaneous" transfer processes.

215. But even when governmental participation in population transfers is insidious and merely takes the form of encouragement or inducement, it can contain enough governmental authority to raise the consequences for a subject population to the level of genocide. Awareness of the destructive effects of the transfer on the affected group, concurrent with continued governmental

involvement or failure to undertake action to terminate the transfer, would render ineffective a Government's claim to lack of intent.

216. Reliance on the Genocide Convention in cases of population transfer has certain shortcomings unrelated to the challenge of proof of intent. The Convention derives its terms from the Nuremberg Principles affirming individual responsibility for war crimes and crimes against humanity. 178/ Applying the Convention, with its subject as "persons, whether they are responsible rulers, public officials or private individuals" (art. IV), has proved elusive. In fact, selecting the individual or individuals to charge may have discouraged testing the Convention's usefulness in cases where such individuals are less identifiable than the larger State or government mechanisms forming and/or implementing policy. The "low-intensity" or incremental nature of violations with genocidal purpose and effect may evade the intergovernmental consensus presumed necessary to apply this instrument.

217. Few conventions give jurisdiction to an international criminal court. The Genocide Convention (art. 6) and the Apartheid Convention (art. 5) do, although not exclusively. Most other conventions rely on national jurisdictions, as for example the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (art. 7). Still, preference is traditionally given to the jurisdiction of the State in whose territory the crime was committed. This custom would prove problematic in international attempts to prosecute a crime against apartheid, for example, or genocide.

218. Although "any Contracting Party may call upon the competent organs of the United Nations to take action ... for the prevention and suppression of acts of genocide" (art. VIII), the Genocide Convention has never been invoked, except for rhetorical purposes. The Genocide Convention stands, in the light of all the breaches of its provisions since its adoption in 1948 as a marked example of the deficiency of international political will to uphold a standard designed to deter the most heinous of human rights abuses. Thus, the prospects for applying this instrument to prosecute in the case of population transfers, which are far more common than classic cases of genocide through extermination, seem remote.

6. Universal Declaration of Human Rights

219. The Universal Declaration of Human Rights, drafted in the aftermath of the Second World War, was adopted by world consensus on 10 December 1948. 179/ Although not intended as a legally binding instrument, its legal significance stretches beyond original intentions. It provides an authoritative guide to the interpretation of provisions of the Charter of the United Nations, it has been invoked by the General Assembly on many occasions and has influenced the adoption and interpretation of national and treaty law. 180/ The Declaration has been cited by the International Court of Justice and the European Court of Justice and forms the basis of implementation mechanisms at the United Nations level. 181/ The Declaration in its entirety or, at a minimum, a great number of the provisions contained therein are held to constitute general principles of law or binding rules of customary law. 182/

220. Population transfers would necessarily contradict the letter and spirit of almost every article of the Declaration, as it was inspired by the determination to prevent the horrors and atrocities committed during the Second World War, of which transfers of people had been recognized as one of the most serious. 183/

221. Within the scope of the present report, it suffices to state that the concept of human dignity underlying the Declaration and its proclamation as "a common standard of achievement" cannot be reconciled with the continuing practice of population transfer. Of particular relevance in this context are article 9 prohibiting arbitrary detention or exile, article 13 guaranteeing freedom of movement and article 15 granting the right to a nationality and prohibiting the arbitrary deprivation of nationality.

222. The rights contained in the Declaration have been expanded upon in the two International Covenants and elsewhere. Through an analysis of these texts, the pertinence of a number of their provisions to population transfers and the potential legal protection they offer will be examined.

7. International Covenant on Civil and Political Rights

223. Analysed in the light of the provisions of the International Covenant on Civil and Political Rights, 184/ population transfers would, through their practice or effects, interfere with the meaningful implementation or constitute outright violations of a large number of its articles, including the non-derogable ones listed in article 4.

224. Singling out a specific distinct group to be subjected to population transfer would violate the non-discrimination principle contained in the Covenant, if the distinction were based on the criteria set forth therein. Past and present situations illustrate that compulsory transfer, including population transfer under exchange treaties between States, inherently result in heavy loss of life among the affected populations, which would constitute a violation of the right to life enshrined in article 6. 185/ Torture and other forms of degrading treatment frequently accompany population transfer, particularly through enforcement measures, and persons transferred are commonly subjected to arbitrary detention before or after transfer and may even be used for purposes of forced or slave labour. The situation of ethnic minorities as noted by the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar is a case in point. The Special Rapporteur informed the Commission that he had received ample evidence indicating that:

> "forced relocation and forced portering led to a systematic pattern of torture (including rape), cruel, inhuman and degrading treatment, disappearances or arbitrary execution of Muslims and other Rakhine ethnic minorities by the Myanmar authorities".

225. Of particular importance in relation to practices of population transfer is the right, contained in article 12 of the Declaration, to freedom of movement. 186/ This right includes the right to leave a country and to return to one's country and the right to internal freedom of movement and choice of residence.

226. The right to enter one's country is directly linked to forced exile or expulsions, means by which persons are deprived of their right to return to their country. In the case of South Africa, entire racial groups have been expelled, forcibly relocated in designated areas, subsequently called "independent States", and denationalized so as to prevent the exercise of their right to return. Policies of mass expulsions, followed by denationalization, or denationalization effected to enable mass expulsions of entire national or ethnic groups have been and continue to be adopted by States for political reasons. Activities aimed at cleansing a territory of a specific ethnic group directly violate an individual or group's right to freedom of movement within a State, as well as their right to return. 187/

227. In the course of implementing policies of forced removal and implantation of settlers, persons and groups designated to be affected may be forcibly resettled to so-called "concentration points" or "model villages" where their movement and development may be strictly limited and controlled. Their right to leave such settlements and thereby to leave their country is in most such cases heavily restricted. Such methods are employed to make way for the settlement of persons belonging to a dominant ethnic group or the occupying Power, with the aim of extending control over a territory or the dispersal and effective control of the original inhabitants of the territory.

228. Population exchanges may result in de facto difficulties of travel between communities and territories even when no official restrictions on the right to leave exist. 188/ The right to freedom of movement in all its aspects is central to questions of population transfer. Whether people are forcibly relocated within a country, or settlement of others on their lands is encouraged, or people are forced to cross international borders, these practices violate a people's basic right to remain. Such a right can logically be understood as a corollary to the right to freedom of movement. Conversely, such freedom of movement necessarily also entails a right to be free not to move. Phrased in terms of freedom to move, the right accentuates the element of voluntariness; forcible transfers of population inherently infringe on the freedom to move.

229. The relevance of the right to freedom of movement to situations in which population transfer occurs is also exemplified by the fact that this right may even be invoked to justify such transfers. For instance, the encouraged or induced movement and subsequent settlement of persons into the territory (whether or not disputed) of a distinct group may be reasoned in terms of the freedom of those persons to move without restriction within a country and choose their place of residence. However, such movements may be carefully planned and aimed at ensuring that a disputed or occupied territory becomes de facto an integral part of the State responsible for inducing or acquiescing in such movement. In such situations, the rights of settlers to return to their country or places of origin may be equally restricted and the right to freedom of movement of the original inhabitants of the territory infringed on as a result of the settlement.

230. The right to freedom of movement as laid down in article 12 of the International Covenant on Civil and Political Rights is subject to restrictions that are "necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are

consistent with the other rights recognized in the ... Covenant". Even though it is a general rule that exceptions to a principle must be interpreted restrictively, so as not to undermine the principle, the rather broad terms "public safety" and "national security" warrant concern as to their possible use and have been noted to be not sufficiently precise to be used as a basis for limitation or restriction of certain rights and freedoms of the individual. 189/ Restrictions generally may not be interpreted in such a manner as to legitimize unnecessary, arbitrary or discriminating measures, aimed at objectives which are contrary to the general aim and purpose of the specific right and the instrument in which it is contained.

231. Article 13 of the Covenant provides that an alien lawfully in a country may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to have his case reviewed by, and be brought before a competent authority. Collective expulsions are incompatible with this provision. However, it seems that protection is limited to aliens lawfully in a country. If a literal interpretation of this provision could imply that mass expulsion of unlawful aliens or immigrants would be allowed, a clear gap in protection against expulsion for this vulnerable group would exist.

232. Forcible transfers of population would constitute arbitrary or unlawful interference with a person's privacy or home, and most frequently lead to separation of families, amounting to a non-respect for family rights. 190/ Article 27, guaranteeing to persons belonging to ethnic, religious or linguistic minorities the right to enjoy their culture, profess their religion and use their language, is of particular relevance to population transfers affecting minorities. However, taking into account the scope of the present report and the existence of the mandate of the Special Rapporteur on minorities to examine the question of population transfers affecting minorities in his forthcoming report, detailed consideration of this provision will be omitted here.

8. International Covenant on Economic, Social and Cultural Rights

233. Although enumerated in a different Covenant, economic, social and cultural rights are indivisible from and interdependent with civil and political rights. 191/ According to the Limburg Principles and article 2 (1) of the Covenant, State Parties to the Covenant are obliged to move as expeditiously as possible towards realization of the rights contained therein. 192/ State practices hampering this process and continued non-compliance cam therefore be considered to constitute violations of economic, social and cultural rights. 193/

234. Like the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, contains a number of provisions directly relevant to an analysis of the legal and human rights dimensions of population transfer. As a preliminary report does not permit an exhaustive analysis of all of its provisions, the following description will be limited.

235. The right to work and the right to education cannot but be impaired in the process of transferring populations (arts. 6 and 13). Moreover, denying means of employment and education to specific groups, or instituting favourable employment or education conditions for one group within a population may culminate in forcing other groups of people to move away from a territory, thereby altering the demographic character of the territory concerned. Where such favourable treatment is afforded on the basis of criteria listed in article 2.2 of the Covenant, such practices would also amount to a violation of the non-discrimination principle contained therein. Additionally, discrimination in or denial of education and employment opportunities is frequently the consequence of the transfer of populations, either into or away from a certain territory.

236. Article 11, which elaborates the right to adequate housing in the larger context of an adequate standard of living, food and clothing, deserves special attention. 194/ The Special Rapporteur of the Sub-Commission on the right to adequate housing has noted that countries illegally occupying territories commonly use housing policies as a tool for favouring their own citizens at the expense of the rights of the original inhabitants, particularly through the use of planning laws and practice of population transfer.

237. In the process of population transfer, people are frequently evicted from their homes or their homes are demolished as part of the relocation effort. In other cases, homes of expellees or relocated people may be occupied and utilized by new settlers moving into the territory.

238. In addition to the violation of housing rights that eviction is recognized to constitute, 195/ the characteristically dismal housing conditions in resettlement sites, model villages or refugee camps could not be regarded as consistent with the norm of adequate housing affirmed in the Covenant. Moreover, article 11 includes a subsequent entitlement to the "continuous improvement of living conditions". In the process of transferring people, their living conditions do not improve, but generally decline. General Comment No. 4 on the right to adequate housing, adopted by the Committee on Economic, Social and Cultural Rights in 1991, interprets that this right:

> "should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head. Rather, it should be seen as a right to somewhere to live in security, peace and dignity". 196/

239. In paragraph 18 of the General Comment, the Committee considered that instances of forced evictions were prima facie incompatible with the requirements of the Covenant and could only be justified in the most exceptional circumstances and in accordance with the relevant principles of international law. 197/

240. Although generally underemphasized, the cultural rights enumerated in the Covenant are of relevance here. The notion of cultural rights has been interpreted to refer to rights of members of communities to preserve their distinct culture. 198/ Cultural rights may protect an individual and his way of life against threats to this aspect of personal dignity. Population

transfer carried out with the intent or effect of homogenizing distinct groups may well constitute such a threat. The same applies to transfers of people instrumental in the enforced assimilation of ethnic groups. Denial of cultural identity, although no such right is explicitly recognized, constitutes one of the main sources of ethnic conflict today.

241. Article 15 of the Covenant recognizes, inter alia, the right of everyone to take part in cultural life. The right to self-determination, elaborated in article 1, includes the right of peoples to freely pursue their cultural development.

242. Of the general provisions, article 4 relates to restricting the rights contained in the Covenant and provides that the State may subject such rights only to such limitations "as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". 199/

243. Article 5 prohibits abuse of the rights enshrined in the Covenant and prevents extensive application of the limitation clauses contained therein.

244. In his analytical report on internally displaced persons, the Secretary-General noted that the standards set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights were broad and general, intended to cover freedom of movement and residence in general, rather than displacement as such. However, "in the light of accumulated experience", he noted,

> "it may also be possible, in addition to reaffirming the general standards contained in those instruments, to elaborate more specific guidelines concerning the situations in which displacement most often occurs, in particular displacement which is carried out as a deliberate governmental policy". 200/

9. Conventions of the International Labour Organisation

245. Born of a post-First World War recognition that international peace and world order could only be assured through the establishment of social justice, the International Labour Organisation (then the Labour Commission) set out to improve the working conditions of labouring people throughout the world by building an international labour code.

(a) Conventions on forced labour

246. In developing this code, ILO adopted Convention No. 29 concerning Forced or Compulsory Labour, in 1930, 201/ with the purpose of suppressing the use of forced or compulsory labour in all its forms within the shortest possible period (art. 1). Convention No. 29, the most widely ratified of the ILO instruments, 202/ permitted such practices within the transition period only in exceptional cases, subject to explicit conditions. Article 8 (2) stipulates that every decision to have recourse to forced or compulsory labour rests with the highest civil authority in the territory

concerned, but which may delegate relevant authority to the highest local authority, except where such decision involves "the removal of workers from their place of habitual residence".

247. During the transition toward abolishing forced and compulsory labour exacted as a tax, article 10 (d) establishes the condition that the authority concerned must satisfy itself, inter alia, "that the work or service will not entail the removal of the workers from their place of habitual residence". Providing further detail concerning the harmful conditions obtaining in the transfer of workers for forced or compulsory labour, article 16 (1) stipulates that, "except in cases of special necessity", such workers "shall not be transferred to districts where the food and climate differ so considerably from those to which they have been accustomed as to endanger their health". Under conditions of transfer, authorities are required to alleviate the detrimental effects. Paragraph 2 of article 16 states that:

> "in no case shall the transfer of such workers be permitted unless all measures relating to hygiene and accommodation which are necessary to adapt such workers to the conditions and to safeguard their health can be strictly applied".

Paragraph 3 adds that, when such transfer cannot be avoided, "measures of gradual habituation to the new conditions of diet and of climate shall be adopted on competent medical advice".

248. The subject of Convention No. 29 is limited; its provisions do not apply in cases involving compulsory military service, the consequences of conviction in a court of law, normal civic obligations or any work or service exacted in cases of emergency, including natural disasters and war (art. 2 (2)). It also excludes "work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country" (art. 2 (2) (b)). Conversely, therefore, it would not exclude a range of forced or compulsory activities in non-self-governing territories.

249. This ILO Convention, therefore, does not categorically prohibit transfer of individuals or groups. However, it does limit the practice in peace-time and introduced a new minimum standard for its time. Further, the Convention's language conveys its transitory nature with the implication that Convention No. 29 constitutes an interim standard to be superseded by more progressive instruments of law.

(b) Conventions concerning indigenous and tribal populations

250. In 1957, ILO adopted Convention 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries. This Convention set out, as implied in its title, to standardize State responses to the presence of these vulnerable peoples on the basis not of recognizing their special situation, but of eventually eliminating their distinctive nature through assimilationist policies. Although this eventually came to be seen as ultimately destructive to indigenous and tribal peoples in many important ways, this Convention's provisions opened the way to recognizing the rights of these peoples to their lands and establishing the rule of compensation. It provides:

"Article 11.

The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized.

"Article 12.

1. The populations shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.

3. Persons thus removed shall be fully compensated for any resulting loss or injury." (Emphasis added.)

251. In addition, Convention No. 107 sets out to establish legal legitimacy for population transfer in three categories: national security, national economic development and in the interest of the health of the subject population. The legality is grounded in the condition that the transferred population's situation actually be improved after resettlement. This elusive objective may be the ultimate test of the acceptability of transfers carried out for the three reasons outlined in this Convention.

252. ILO rejected policies of homogenization when it concluded in 1986 that "the integrationist approach is inadequate and no longer reflects current thinking". 203/ Then ILO favoured policies that would allow "indigenous and tribal peoples [to] enjoy as much control as possible over their own economic, social and cultural development". 204/

253. ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries was adopted in 1989 to supersede ILO Convention No. 107. Although Convention No. 169 may at first glance seem to contain specific provisions aimed at curtailing the forcible removal of indigenous peoples from their lands, a closer analysis demonstrates the existence of major loopholes in the legal protection against such continuing practices.

254. The first two paragraphs of article 16 read:

"1. Subject to the following paragraphs of this article, the peoples concerned shall not be removed from the lands which they occupy.

"2. Where the relocation of these peoples is considered to be necessary as an exceptional measure, such relocation shall take place only with

their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned."

255. These paragraphs, although implying the underlying principle that indigenous peoples should not be removed from their lands, presume - and may be invoked to justify - the continuation of such practices nevertheless. If the authorities deem relocation "necessary as an exceptional measure", they may conceivably proceed even without the consent of the peoples concerned, "following appropriate procedures established by national law". It is entirely at the State's discretion to decide whether the removal is necessary, to establish procedures governing the relocation process and to decide whether it is appropriate to include public inquiries. 205/ The following paragraphs of this article state:

"3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

"4. When such return is not possible, as determined by agreement or, in absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

"5. Persons thus relocated shall be fully compensated for any resulting loss or injury."

256. As a large proportion of indigenous lands are expropriated for "development"-related reasons or exploitation, return to traditional lands "as soon as grounds for relocation cease to exist" may effectively mean return to places which have been ecologically exhausted, destroyed or contaminated. That is, in most cases, not a viable or humane option.

257. The only two other options open are monetary compensation or alternative lands, the notion of which denies the fundamental relationship indigenous peoples have with their traditional lands. From the indigenous point of view, "alternative lands of equal quality" constitutes a contradictio in terminis, as the main qualitative factor lies in the spiritual, cultural and traditional value a particular place has for that community, which cannot be replaced. In the words of an indigenous lawyer,

"Does no one realize that our relationship is to a particular place? There seems to be an assumption that any land will be adequate. In our worldview, the land which identifies us does not change like the wind. Removing us from our land is, in fact, to take away our life force". 206/

258. Corroborating this view, an elder facing transfer explains that relocation is a word that does not exist in the Navajo language; to be relocated is to disappear, and never to be seen again. 207/

259. Monetary compensation for relocating indigenous peoples raises a number of very difficult questions. Past experience has demonstrated that monetary compensation is actually an effective contribution to the demise of entire indigenous peoples and has resulted in the impoverishment and marginalization of most tribal and indigenous peoples thus relocated. 208/

260. Other provisions relevant in the context of the present study may include: article 7 granting peoples the right to decide their own priorities for the process of development; article 13 stating that:

> "Governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories ... which they occupy or otherwise use, and in particular the collective aspects of this relationship";

article 14 recognizing a people's rights to ownership and possession of lands it traditionally occupies; and article 15 safeguarding the right of the people concerned to the natural resources of its lands.

261. A yawning gap exists in the international legal protection afforded to indigenous and tribal peoples against relocation, forced removal, or settler encroachment on their lands. So far the international community has failed to recognize or protect property rights, especially of indigenous peoples, allowing for the concept of res nullius to be applied to their lands. This has resulted in the implantation of new inhabitants and the subsequent displacement of the indigenous peoples from their lands.

10. Convention on the Reduction of Statelessness 209/

262. Issues of nationality and statelessness may be raised in the context of population transfer. People or entire groups may be deported following deprivation of citizenship. The expulsion of "undesirable aliens" may render such persons stateless. Questions of statelessness may arise once a former sovereign has resumed power with regard to settlers and their descendants who unlawfully moved into the territory while occupied.

263. Even though it is accepted that States enjoy discretion on matters of nationality, international law provides for some individual protection in this field. Where the transfer of territory is concerned, the Convention on the Reduction of Statelessness provides in article 8 that "A Contracting Party shall not deprive a person of his nationality if such deprivation would render him stateless".

264. Of special pertinence is article 9, which provides: "A Contracting Party may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds".

265. Article 9 contains no exception clauses unlike article 8, in accordance with which deprivation of nationality, even if this would leave an individual

stateless, is possible under special circumstances, including fair legal procedures. Mass deprivation of nationality, for instance, to serve large-scale forcible expulsion or deportation of entire ethnic or racial groups, would be permitted under no circumstance. Article 1 holds that nationality should be granted at birth or upon application to a person born in a State's territory who would otherwise be stateless.

266. Similarly, the Convention relating to the Status of Stateless Persons 210/ provides in article 31 that a State "shall not expel a stateless person lawfully in their territory save on grounds of national security or public order", and then only in pursuance of a decision reached in accordance with due process of law. Thus the possibility of expelling individuals after due process and determining individual guilt does not imply the right to carry out the mass expulsion of groups. 211/

267. More complex questions are bound to come up in the case of former occupied countries after regaining independence. Owing to newly enacted citizenship laws of the revived State, civilians who illegally moved there during occupation may be excluded from being granted automatic nationality, rendering them aliens, illegal immigrants or, in the worst case, stateless. As States carry responsibility for international wrongdoings, solutions will have to be found on the basis of mutual agreement and responsibility, based on the principle of avoiding the creation of statelessness as far as possible.

11. International Convention on the Suppression and Punishment of the Crime of Apartheid

268. The International Convention on the Suppression and Punishment of the Crime of Apartheid 212/ expressly forbids legislative and other measures that have the effect of physical separation and other means of excluding a particular group from national, economic or social life. In defining "the crime of apartheid," the Convention includes generally the "deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part" (art. II (b)). It cites, in particular, legislative and other measures which deny to members of such affected groups "basic human rights and freedoms, including ... the right to leave and return to their country ... [and] the right to freedom of movement and residence" (art. II (c)). The definition also covers legislative and other measures "designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups ... [and] the expropriation of landed property belonging to a racial group or groups or to members thereof" (art. II (d)).

269. The Declaration on Apartheid and Its Destructive Consequences in Southern Africa 213/ characterized apartheid as "a crime against the conscience and dignity of mankind" that has caused "massive displacement of innocent men, women and children". However, among the recommendations for measures to create a climate for negotiations, the return of the expellees or other remedy for those affected by forced removal was not addressed.

12. Prohibitions against Slavery

270. Particularly in situations of war, but also during peace-time, persons may be deported or forcibly transferred specifically for forced labour or sexual slavery purposes. The International Military Tribunal condemned enslavement as a crime against humanity alongside deportation, and defined deportation for slave labour as a war crime. Prohibition of slavery is contained in a number of international instruments from an early date, such as the Slavery Convention (1926) 214/ and the Supplementary Convention on the Abolition of Slavery (1956) 215/ and the prohibition of slavery and therewith deportation for enslavement are considered norms of customary international law, and acts of subjecting persons to slavery as contravening jus cogens. 216/ Even today, deportation for slave labour and sexual slave practices occurs, and attention is demanded for compensating victims of deportations for slavery. 217/ Clarifying broader issues surrounding population transfers may indeed also help to prevent such practices from continuing and the strong international condemnation of slavery contained in international law is of crucial importance for halting this particularly gruesome instrumentalization of deportation and forcible removal of individuals from their homes for purposes of labour and sexual exploitation.

13. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

271. A recent development in the field of human rights protection is the adoption in 1991 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Migrant Workers Convention). 218/ Migration for economic reasons has become a global phenomenon and, as the settlement of migrant workers and their families in migrant-receiving countries takes on a more permanent character, specific protection of this vulnerable group - estimated today at 80 million people worldwide - is of increasing importance. 219/

272. The Convention reaffirms existing principles also underlying the different instruments discussed above. Article 8, for instance, enumerates the right of migrant workers to leave any State, including his/her State of origin, and the enter and remain in his/her State of origin. The Convention provides for the non-interference in the privacy, family and home of the migrant worker and the right not to be arbitrarily deprived of property. 220/ Migrant workers and members of their families shall not be subject to collective expulsion. The principle remains that expulsions of non-naturalized entrants can be justified in individual cases only in pursuance of due process and a decision taken by a competent authority. 221/

273. Article 39 guarantees freedom of movement and freedom for migrant workers to choose residence in the State of employment. The rights to external and internal freedom of movement are both subject to restrictions for reasons of national security and public order, inter alia.

274. Finally, article 56 states explicitly that migrant workers and their families may not be expelled from a state of employment, except for reasons defined in the national legislation of the State and subject to the safeguards

established in the Convention. Paragraph 2 emphasizes that expulsion shall not be resorted to for the purpose of depriving migrant workers of their rights arising out of the authorization of residence and the work permit.

D. Other international agreements

275. In addition to the international instruments discussed above, a significant number of international conventions and declarations contain provisions of varying relevance to the prohibition or regulation of population transfer, or related practices. The format of the present report does not allow for exhaustive analysis of each of this. A preliminary report would not be complete, however, without a brief mention of the relevant instruments and articles.

276. Pertinent to the question of population transfer are, inter alia:

Convention relating to the Status of Refugees (1950), articles 10, 26 and 32;

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), article 3;

Convention on the Rights of the Child (1989), articles 11 and 35;

Declaration on Territorial Asylum (1976), article 3;

Declaration on Social Progress and Development (1969), articles 17 and 22;

Declaration of the United Nations Conference on Human Environment (1972), principle 15;

UNESCO Declaration on Race and Racial Prejudice (1978), article 9;

Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (1985), articles 5 and 7.

E. Regional law

277. In addition to international legal standards, norms have been developed at the regional level as well. Of relevance to the present report are the European Convention for the Protection of Human Rights and Fundamental Freedoms the African Charter on Human and Peoples' Rights and the American Convention on Human Rights.

278. Although only certain manifestations of the practice of population transfer may find explicit mention in these instruments, other provisions are pertinent to population transfers and entail more or less wide-ranging implications for its prohibition. However, the scope of the present preliminary study does not permit a comprehensive overview of all relevant provisions.

1. European Convention for the Protection of Human Rights and Fundamental Freedoms

279. Of particular relevance to population transfer is the express prohibition of mass expulsions contained in article 3 of the Fourth Protocol to the Convention for the European Protection of Human Rights and Fundamental Freedoms, which states:

> "No one shall be expelled, by means either of an individual or a collective measure, from the territory of the State of which he is a national".

280. In addition, article 4 prohibits the "collective expulsion of aliens". Neither provision contains any exception clauses. Until recently, the European Convention did not contain provisions guaranteeing procedural safeguards for an alien threatened with expulsion comparable to article 13 of the International Covenant on Civil and Political Rights. This omission has been remedied by the inclusion of article 1 in the Seventh Protocol to the Convention, which grants a number of judicial rights to a legal alien under the threat of expulsion. Paragraph 2, however, allows for the expulsion of a legal alien on grounds of public order and national security before the judicial process elaborated in paragraph 1 has taken place.

281. Other provisions of the European Convention may imply legal protection against population transfer. Such provisions may include: article 2 of the Fourth Protocol, recognizing that "everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence", although subject to the broadly formulated exception and limitation clauses contained in paragraphs 3 and 4. Under these provisions population transfer could be argued justifiably on grounds of security or ordre public; article 2, guaranteeing the right to life; article 3 prohibiting inhumane and degrading treatment and article 8 ensuring respect for private and family life and the home.

282. Article 8 has been judicially considered in the Cyprus v. Turkey case in relation to the population transfer and eviction of Greek Cypriots. 222/ The European Commission on Human Rights considered in its deliberations, inter alia, "that the transportation of Greek Cypriots to other places, in particular the excursions within the territory controlled by the Turkish army, and the deportation of Greek Cypriots to the demarcation line ... also constitute an interference with their private life", guaranteed in article 8 (1).

283. According to this deliberation, "transportations" and deportations of Greek Cypriots were considered infringements of the right to private life.

2. African Charter for Human and Peoples' Rights

284. The African Charter for Human and Peoples' Rights, the central instrument of the Organization of African Unity (OAU), is interesting with respect to population transfer, while it expressly recognizes a number of collective or so-called peoples' rights. Even though it does not contain a prohibition of

population transfer per se, some of its provisions are directly relevant to aspects of the practice of population transfer.

285. The Charter's listing of civil and political rights resembles the set of rights guaranteed in the International Covenant on Civil and Political Rights. Pertinent to population transfer is article 6, containing the right of every individual to "liberty and security of his person". Article 12 (5) provides that "mass expulsion of non-nationals shall be prohibited".

286. Article 12 (5) continues by establishing that "mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups". This provision recognizes the collective character of expulsions and that such measures may indeed be carried out on the basis of nationality, ethnicity, race or religion. 223/ In certain cases, aliens are subject to mass expulsion as part of a broader population transfer policy directed at a distinct group. Such groups may be considered aliens, for instance, under changing nationality laws or in the situation of disputed territories. Article 12 (5) constitutes one clause of the broader provision affirming the right to freedom of movement and to leave and return to one's country, thereby linking the issues of mass expulsions and individual freedom of movement. The African Charter is silent on expulsions of nationals.

287. Also of relevance may be a number of economic, social and cultural rights contained in articles 17 and 18 stressing education, participation in cultural life, protection of the family and the rights accorded specifically to peoples. For example, article 19 provides that all peoples shall be equal and that nothing shall justify the domination of a people by another; article 20 recognizes the right to existence, self-determination and liberation from oppressors. Article 21 states that "all peoples shall freely dispose of their wealth and natural resources"; article 22 guarantees the right to development and article 23 recognizes the "right of all peoples to national and international peace and security".

288. If the notion of a "people" in the context of these collective rights were to equal the existing African "State", as some suggest, the peoples' rights contained in the Charter would merely be a listing of State's rights and not contribute much to human rights and the recognition and protection of collective juridical subjects, as well as individuals. If, however, the concept of a "people" were not to be interpreted as identical to "States" and the peoples' rights contained in the Charter thus pertained to, inter alia, non-dominant populations, indigenous and tribal peoples within the African State, 224/ the African Charter could go a long way in providing protection against involuntary displacement and population transfers affecting such distinct groups.

289. It is worth mentioning that, in addition to the African Charter, the rights of non-nationals in OAU member States are addressed also in the OAU Convention governing the Specific Aspects of Refugee Problems in Africa, 225/ in particular in articles ii and v. These articles, inter alia, affirm the cooperation of member States in facilitating humanitarian service to refugees and reemphasizing that repatriation of refugees should be on a voluntary basis.

3. American Convention on Human Rights

290. Three principal and interrelated documents constitute the system of human rights protection in the Americas: the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. 226/ The OAS Charter, the legal foundation of the OAS system, affirms the principles of non-aggression and non-discrimination. Article 20 condemns military occupation and rules in this context that "no territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized". The American Declaration, similar in role to the Universal Declaration in the United Nations system and an authoritative source for the rights actually protected under the OAS Charter, enshrines a number of economic, social and cultural, as well as civil and political rights, including the rights to life, freedom of movement and nationality.

291. With respect to the American Convention, the central human rights treaty of this legal system, population transfers would violate article 4 enshrining the right of every person to have his life respected and not be arbitrarily deprived of his life. Article 5 guarantees respect for physical, mental and moral integrity and the right to humane treatment. As noted above, nowadays few persons would consent to the notion of "humanely" uprooting peoples from their territory. It is difficult to reconcile practices of population transfer with the rights to personal liberty, security, privacy and protection of the family unit as set forth in articles 7, 11 227/ and 17.

292. Article 22 recognizes the right to freedom of movement, but the right to reside in the territory of a State is "subject to the provisions of the law". The broad wording of this clause warrants concern over potential use to deny persons the right to stay in the country. According to paragraph 3, the right to reside, to internal movement and to leave may furthermore be restricted "to the extent necessary in a democratic society, to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights and freedoms of others". Some of these elaborate categories provide loopholes and comfortable justifications for relocating or displacing vulnerable groups, or moving settlers into a territory inhabited by distinct population groups.

293. However, paragraph 6 prohibits the expulsion of nationals from the State's territory and grants them the right of entry. In accordance with paragraph 6, aliens can only be expelled after due process and a decision pertaining to an individual case. Collective expulsions of aliens are expressly prohibited in paragraph 9. The different provisions interpreted together would entail the prohibition of mass expulsions of nationals as well as aliens from a State's territory. The right to equal protection of all persons of the law, as phrased in article 24, would strengthen the prohibition of mass expulsions or deportations on the basis of collective criteria as it infers the right of each person to have his/her expulsion case reviewed by the court.

VII. RIGHTS OF STATES AFFECTED

294. To be considered in their context, the human rights dimensions of population transfer are explored with regard to the reciprocal relationship between the individual and the State. The rights (and obligations) of States affect the enjoyment of human rights in a number of ways that are relevant to population transfer.

A. State sovereignty

295. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations 228/ elaborates principles of the Charter in the broadest language to date, guaranteeing the rights of peoples to self-determination, as well as the rights of States. It reaffirms the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, protecting States from direct or indirect intervention by another State or group of States, for any reason whatever, in their internal or external affairs. It holds that "any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security".

296. This right of States to territorial integrity and non-intervention is mutual and reciprocal; however, it must be weighed in relation to other legal principles that likewise affect the overriding value of world peace and security deriving from friendly relations and cooperation among States. According to the Declaration, "the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law." It asserts that the effective application of this principle is "of paramount importance" to the purposes of the Declaration.

297. It would appear that the sovereign rights of a State may not be absolute and, as circumstances require, become subordinate to the rights of peoples to self-determination and the principle of non-discrimination. This was affirmed by the United Nations in its challenge to South Africa's claims to the right to overriding sovereignty in domestic matters in the face of the repudiation by other States Members of its apartheid policies.

298. To realize these values, within the context of this legal dynamic, States are empowered under certain international treaties to enforce compliance with human rights principles by its constituent departments, public bodies and citizens within their domestic - and, in some instances, extraterritorial - activities. For instance, the Racism Convention explicitly empowers States to "prohibit and bring to an end, by all appropriate means, including legislation required by circumstances, racial discrimination by persons, groups or organizations" (art. 2.1 (d)).

299. In the real world, balancing the rights of State sovereignty against other values is a standard issue in public international law. The sovereignty doctrine, one of the cornerstones of the Charter of the United Nations, continues in practice to take precedence over the equally compelling obligations to respect human rights and to provide humanitarian assistance to

those whose rights are violated. With reference to recent lessons from the 1991 war against Iraq, one government spokesperson asserted that "the internal affairs of a country cannot always be divorced from the external impact - for example, when they involve the displacement of hundreds of thousands of people". 229/ However, some emerging interpretations of sovereignty could actually enhance human rights and humanitarian protections, particularly when contiguous States intervene as population transfer may lead to cross-border migration. However, the prevalence of so many unresolved cases of forced population transfer, including the refugee problems flowing from them, attest to a continuing imbalance.

B. National development

300. The Special Rapporteur of the Sub-Commission on the realization of economic, social and cultural rights pointed out in his final report on that topic that "the term 'development' is much like the term 'peace'; everybody supports it, but few define the concept in precisely the same manner." 230/ It is staggering to reflect on the plethora of justifications for population transfer that involve both of these concepts as their putative goals. In the pursuit of development, population transfer can be an intended or unplanned result. Therefore, regardless of a given project's stated objectives with regard to the placement of affected populations, the long view of the State's right to development is inextricably linked to the human rights dimensions of population transfer, among other human rights concerns. This discussion is particularly relevant in the light of the apparent correlation between the public assertion by some States of their "national right to development" and the negative human rights consequences of economic processes in those countries related to population transfer.

301. Development policy and planning for public purposes are generally functions of government, and some clarification may still be needed as to the dual aspect of development as both a right and an obligation of States. Contrary to the belief of many technocrats and policy planners, development - particularly with its often-alien concepts - is not a panacea. As already noted above, the consequent destruction or removal of a population's natural resource base increases the difficulties in eking out a livelihood, obtaining food and building materials, and undermines community integrity. These are typical consequences for land-based, tribal and indigenous peoples in the path of large-scale development projects, even after planned resettlement. The World Bank has predicted that "the volume of people who must be displaced in the name of progress is sure to grow as the world's urban populations increase". 231/ It follows, therefore, that the primary subjects of this process are those populations who, in the eyes of development planners, are not yet recipients of "progress". These are likely to be distinct populations, especially indigenous peoples, whose communities and way of life such development is destined to alter beyond recognition.

302. In 1975, the General Assembly adopted the Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind. 232/ That Declaration was negotiated to meet the "urgent need to make full use of scientific and technical developments for the welfare of man [and woman] and to neutralize the present and possible future

harmful consequences of certain scientific and technological achievements". 233/ It proclaims that all States shall promote international cooperation with the purpose of strengthening peace and security, and also emphasizes the values of realizing human rights and freedoms, non-discrimination and the economic and social development of peoples, and reaffirms the right of peoples to self-determination. With particular respect to State responsibilities, the Declaration calls on States to take appropriate measures "to prevent the use of scientific and technological developments, particularly by State organs, to limit or interfere with the human rights and fundamental freedoms of the individual" (art. 2), and to ensure that such achievements "satisfy the material and spiritual needs for all sectors of the population" (art. 3). Article 6 calls on States also to protect all strata of the population "from possible harmful effects of the misuse of scientific and technological development, including their misuse to infringe upon the rights of the individual or of the group".

303. The Declaration on the Right to Development (1986) gives meaning and substance to the relationship between development and human rights. 234/ As pointed out by numerous observers, the right to development highlights the integrated nature and universality of the two international Covenants on human rights and could provide a useful framework within which to emphasize the interdependence of civil, political, economic, social and cultural rights. 235/ The rights emphasized in this Declaration belong to nations and peoples; whereas States are referred to in terms of their obligations under the Charter "to universal respect for and observance of human rights and fundamental freedoms for all" on a non-discriminatory basis. 236/ However, article 8.2 refers to the right and duty of States to formulate appropriate national policies that "aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom".

304. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights seek to oblige States to take immediate and progressive steps to realize fully these rights through the effective use of available resources. 237/ While States are obliged progressively to achieve the realization of economic, social and cultural rights for all, non-discrimination is a principle of jus cogens, which also applies to development. This may be understood to mean that development should not be withheld from groups on a discriminatory basis, but also that the ill effects of development should not fall disproportionately on distinct groups.

305. The 1990 Global Consultation on the Right to Development as a Human Right noted specifically that the "indigenous peoples have been throughout history the victims of activities carried out in the name of national development". It further noted that the affected peoples' "direct consent on decisions regarding their own territories [is] essential to protect their right to development". 238/ The report of the Secretary-General to the Commission on Human Rights on the question of the realization of the right to development" noted the work of the Global Consultation and endorsed its recommendation that explicit guidelines, appraisal criteria and human rights

impact assessments be developed 239/ which could assist States in realizing the right to development in an integrated manner with established human rights. 240/

306. Article 22 of the Covenant on Economic, Social and Cultural Rights is concerned with the implementation and progressive realization of the terms of the Covenant by United Nations agencies. In the light of article 22, the Committee on Economic, Social and Cultural Rights resolved to consider means by which the various United Nations agencies working in the field of development could best integrate into their activities measures designed to promote full respect for economic, social and cultural rights. 241/ In its General Comment No. 2, the Committee asserted that:

> "international agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. In positive terms, it means that, wherever possible, the agencies should act as advocates of projects and approaches which contribute not only to economic growth of other broadly defined objectives, but also to enhanced enjoyment of the full range of human rights".

The General Comment goes on to point out that "many activities undertaken in the name of 'development' have subsequently been recognized as ill-conceived and even counterproductive in human rights terms". 242/

307. Standards set for the particular respect of tribal land rights in the development context were also set in 1987 by the World Commission on Environment and Development. It asserted that "the starting point for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and other resources that sustain their way of life - rights they may define in terms [that] do not fit into standard legal systems". Thus, with this reaffirmation of the respect for human dignity and the principle of non-discrimination in development, the legal discourse and standards pertaining to the right to development have reflected increasing cognizance of the potential human rights consequences of economic processes which, like warfare and natural disasters, can give rise to population transfer and its harmful effects. In view of these developments, therefore, it emerges that a "national right to development" engages established human rights in their integrity, as well as a host of State obligations to preserve and fulfil these rights, and thus avoid the negative consequences of development-generated population transfer.

C. Public purpose

308. In the interest of the relevant community or society, governments are required to facilitate the provision of services, such as schools, roads, health centres, power stations, airports, housing and other public spaces. In doing so, land must be obtained, and various methods of acquisition are implemented. The human rights dimensions of planning and land acquisition for public purposes are an increasing global concern, given the problems

associated with the burgeoning need for land for housing; unplanned, uncontrolled and segregated urban development patterns; and widespread land speculation that increases land prices beyond the financial reach of the majority of citizens. State measures to respond to public needs include compulsory purchase of private property or untitled lands belonging to communities, subject to the terms and procedures prescribed by law. This power is exercised from time to time by virtually every Government, except in countries where all land is already invested in the State. Some countries have developed efficient, effective and socially equitable mechanisms. However, this is not often the case and populations may suffer negative human rights consequences from public purpose acquisitions that go unremedied or uncompensated.

309. The State or government is acting within its right when it compensates land-based subjects of land acquisition in compliance with the principles set forth in previously mentioned agreements and legal guidelines. In particular such action should not be non-discriminatory by creating a pattern of disproportionately affecting a distinct group, or by removing land or resources from one group for the exclusive use of another. The policy must not be arbitrary, impose ethnic segregation or apartheid, destroy the natural environment, nor impinge upon a people's right to self-determination. Further, such public-purpose projects affecting indigenous and tribal populations should take particular account of their special relationship to their land, including respect for its religious significance, in accordance with the principles set forth by the Brundtland Commission. Such issues become accentuated with large-scale acquisitions by governments, particularly when carried out well in advance of the stated need.

310. In most countries, the legal set up would exclude compensation for "illegal" or "unauthorized" structures, and some governments offer only ex gratia compensation. However the requirements of participation and consent in the development process may oblige the State to formalize reasonable and acceptable compensation of the affected persons. Therefore, for a State to act within its rights, the compulsory transfer of populations should be avoided on the basis of these same human rights principles. Further, demographic manipulation of the relevant (external or internal) self-determination unit through the implantation of settlers, under the legal claim of "public purpose", would be likewise prohibited.

D. Transfer of population without consent

311. The International Convention on the Elimination of All Forms of Racial Discrimination recognizes the distinction between citizens and aliens with regard to States' rights and obligations. 243/ Similarly, the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live 244/ does not limit a State's right to restrict the stay of illegal entrants. In the case of legal immigrants or entrants, expulsion or deportation may be lawful only as long as human rights norms are respected. That is, it would be necessary for a State to ensure due process in such a deportation or expulsion, that the persons affected must be aliens, illegal entrants or other non-citizens who are not internationally protected persons and that the action or policy must not constitute discrimination towards a particular group.

E. States' rights with regard to citizens' responsibilities

312. In accordance with modern legal and political concepts, concern for the interests of citizens is the principal reason of State (raison d'État). On the other hand, however, the modern State also expects its citizens to remain loyal to it. The need for certain legal links between an individual and the State as a basis for conferring nationality has been expressed in the International Law Commission during debates on the elimination and reduction of statelessness. 245/ The criteria of habitual residence and allegiance formed a significant part of that debate, which culminated in two United Nations conferences to adopt the Convention on the Reduction of Statelessness. 246/ Article 8 of that Convention deals with the conditions for deprivation of nationality and refers, in subparagraph 3 (a), to national citizens' "duty of loyalty to the Contracting State".

313. While a citizen's loyalty to his/her State is considered the norm today, it is none the less possible that a citizen or group of citizens aspire to detach themselves and/or their territory from the State. Knowing that their sympathies lie elsewhere, the State distrusts them. Guidance on questions regarding the State's proper response to such situations may refer back to the concept of sovereignty. Certainly, a State's sovereign rights would be transgressed by the intervention of another State or juridical person that supports or incites disloyalty among citizens. Such interference through propaganda, or other means, could be motivated by a purpose of destabilization or annexation of territory. Such forms of subversion may be seen as inconsistent with international security and peaceful cooperation among States.

314. It is not inconceivable that one State would seek to recruit support from citizens of another State on the basis of their race, religion or other ethnic criterion. Such a hypothesis finds its precedent in this century with the Third Reich's self-attributed role as the natural protector of the rights of Germans wherever they might live. The Reich claimed the Schutzrecht (protective right) of the mother State for its folk-groups scattered throughout the world, and considered those Germans not responding to the Führer's call to be "bad Germans", not deserving protection or the privilege of claiming any collective rights as a national minority. In 1941, a representative of the Reichstag pronounced this concept as "the legal basis for the resettlement treaties", 247/ including the German-Soviet Treaty of 3 November 1939, in which Stalin acquiesced to Germany's concept of super-State "racial citizenship" for both ethnic Russians and Germans in liquidated Poland.

315. Historically, such extraterritorial and "race citizenship" concepts have been advanced as legal concepts to legitimize population transfer policies, including the acquisition of territory involving the implantation of settlers. However, the traditional basis of citizenship remains the concept of "State citizenship", whereby the individual is linked to the place of residence and the corresponding State. Under normal circumstances, intervention of an external State or its agents through propaganda, recruitment or incitement of citizens is considered to be in violation of the affected State's sovereignty, particularly when compelling human rights or humanitarian concerns do not necessitate such intervention. Likewise, extraterritorial concepts of

citizenship or nationality may infringe upon the sovereign rights of affected States and are considered null and void. 248/

VIII. EMERGING LAW AND STANDARDS

316. Many aspects and human rights consequences of population transfer are regulated by existing rules and standards. However, further protections and guidelines for regulating the practice will rely upon emerging standards and legal principles, among other future developments.

A. Draft code of crimes against the peace and security of mankind

317. The development of new legal principles and the strengthening and clarification of existing standards of law relative to the protection of persons against forcible population transfer can contribute to recognition and resolution of the serious humanitarian questions such transfer poses.

318. At its second session the General Assembly directed the International Law Commission (ILC) to formulate the principles of international law recognized in the charter of the Nuremberg Tribunal and in the judgment of the Tribunal and prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the Nuremberg Principles. 249/ ILC adopted a draft code in 1954, but from 1954 to 1981, consideration of the draft code was postponed. In 1991, a first reading of the draft code was adopted by ILC. 250/

319. A number of draft articles refer to population transfer. Draft article 21 entitled "Systematic or mass violations of human rights" enumerates five manifestations of such practices constituting crimes, and refers specifically to "deportation or forcible transfer of population". The ILC Commentary to this article states:

> "that a crime of this nature could be committed not only in time of armed conflict, but also in time of peace ... Deportation, already included in the 1954 Draft Code, implies expulsion from the national territory whereas the forcible transfer of population could occur wholly within the frontiers of one and the same State ... Transfers of population under the draft article means transfers intended, for instance, to alter a territory's demographic composition for political, racial, religious or other reasons, or transfers made in an attempt to uproot a people from their ancestral lands". 251/

320. Draft article 22 lists exceptionally serious war crimes. Draft article 22 (a) specifies "deportation or transfer of the civilian population and collective punishment", while draft article 22 (b) includes the "establishment of settlers in an occupied territory" and changes to the demographic composition of an occupied territory in this category. The ILC Commentary explains that:

> "it is a crime to establish settlers in an occupied territory and to change the demographic composition of an occupied territory. A number of reasons induced the Commission to include these acts in the draft article. Establishing settlers in an occupied territory constitutes a

> particularly serious misuse of power, especially since such an act could involve the disguised intent to annex the occupied territory. Changes to the demographic composition of an occupied territory seemed to the Commission to be such a serious act that it could echo the seriousness of genocide". 252/

321. The International Law Commission's starting-point is that this article should be applicable to national as well as international armed conflicts, as serious violations of humanitarian law also occur in national conflicts. This holds true in particular for population transfer which is practised in circumstances that do not constitute "international armed conflicts". Once adopted and ratified, the draft code could foreseeably fill a serious gap in the protection against forced removal and settler policies unaddressed by the Geneva Conventions and their Additional Protocols.

322. In addition to conferring individual criminal responsibility, the draft code specifies that this "does not relieve a State of any responsibility under international law for an act or omission attributable to it". 253/ Consistent with this approach, a noteworthy expert meeting that took place in 1990 at Turku, Finland, recognized the great suffering internal conflicts caused and expressed concern at the inadequacy of protection offered by international human rights and humanitarian law in such situations. The expert meeting proclaimed the Declaration of Minimum Humanitarian Standards. 254/

323. Article 7 of the Declaration provides that:

> "the displacement of the population or parts thereof shall not be ordered unless their safety or imperative reasons so demand ... Persons or groups thus displaced shall be allowed to return to their homes as soon as the conditions which made their displacement imperative have ceased".

Paragraph 2 states, without allowing for exceptional circumstances, that "no person shall be compelled to leave their [sic] own territory". 255/

B. Draft articles on State responsibility

324. The codification and progressive development of the law relating to State responsibility was one of the first projects entrusted to the International Law Commission by the General Assembly. The codification project may be of relevance to practices of population transfer in cases where such practices constitute "an internationally wrongful act". The codification exercise is still in progress and the new Special Rapporteur of the International Law Commission on the topic, Professor Aranjio-Ruiz, has submitted five reports so far. 256/ In these reports, which basically deal with the consequences of an internationally wrongful act, the Special Rapporteur has introduced some changes to the approach followed by his two immediate predecessors, Judge Ago and Professor Riphagen. It is beyond the scope of the present report to discuss those changes. The point should be made, however, that no definitive statement on the impact of the draft articles on the practice of population transfer is possible until the situation becomes clearer on such matters as the consequences of international criminal responsibility; the instrumental

consequences of internationally wrongful acts i.e. countermeasures and the question of dispute settlement procedures. 257/

325. Draft article 1 confers international responsibility on a State for "every internationally wrongful act". An internationally wrongful act is defined as "an act or omission attributable to the State under international law, which constitutes a breach of an international obligation of the State". 258/ Of particular pertinence to policies and practices of population transfer is draft article 19, which provides a regime of international criminal responsibility for breaches by a State of "an obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole". 259/ This provision, inspired by the development of the concept of "obligations erga omnes", whereby all States are held to have a legal interest, provides a non-exhaustive listing of such breaches. It states that an international crime may result, inter alia, from "a serious breach of an international obligation of essential importance for maintenance of international peace and security ... [or] for safeguarding the right to self-determination of peoples". Such a crime may be "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, apartheid".

326. Legal consequences of an international crime are listed in part II of the draft articles and entail obligations for every other State, inter alia, "not to recognize as legal the situation created by such crime, not to render aid or assistance to the State which has committed such a crime in maintaining the situation created by such crime". 260/

327. The pertinence of such obligations to situations created by different methods of population transfer may imply that States are required actively to ensure the undoing of situations created by such transfers and at a minimum not to recognize or support financially the illegal state of affairs.

328. Provided the draft articles form the basis of a law-making treaty, 261/ under such a treaty the obligations could form an effective deterrent against States creating faits accomplis in certain territories, or against certain peoples, by means of population transfer.

C. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities

329. The global issue of minorities within States and the hazards that they face has led to the drafting of a declaration that seeks to protect such vulnerable populations. Under the declaration those belonging to national, ethnic, religious and linguistic minorities are recognized as having a status related to their place of residence. Thus, draft article 1 (1) provides that "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity".

330. The recognition of a minority's right to its physical place and the related rights that that implies is found in draft article 4 (4), which provides that, where appropriate, States should "take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory".

D. Draft declaration on the rights of indigenous peoples

331. The draft declaration on the rights of indigenous peoples 262/ has emerged out of an initiative of the Sub-Commission's Working Group on Indigenous Populations, involving independent experts, Member States and observing non-governmental organizations (including indigenous peoples' organizations). The draft declaration addresses a number of themes relevant to the human right dimensions of population transfer, in particular discrimination, land, sovereignty, and the rights to traditional culture, democratic participation, development and housing. The draft declaration also recognizes policies having the effect of cultural loss (ethnocide) and introduces the idea of remedy for harmful policies through reparations to victims.

332. In its preamble, the draft declaration welcomes indigenous peoples organizing themselves "to bring an end to all forms of discrimination and oppression wherever they occur". The subsequent text consistently recognizes the distinct nature of indigenous populations as the subject of discrimination eligible for specific protection under improved international standards. Non-discrimination as a political right is affirmed with regard to access to the democratic process. Part V affirms "the right to participate on an equal footing with all other citizens and without adverse discrimination in the political, economic, social and cultural life of the State" (para. 23).

333. In the preamble, the draft declaration sets out the importance of place to indigenous rights. It expresses concern that indigenous peoples have often been deprived of their human rights and fundamental freedoms, "resulting in the dispossession of their lands, territories and resources, as well as in their poverty and marginalization". Part II, paragraph 7 (c) recognizes indigenous peoples' right to prevention of and redress for "dispossession of their lands, territories or resources". The right to a place to live is also specifically recognized with regard to the right to housing as a component of the right to development (Part IV, para. 22), as well as in the light of collective rights to autonomy (Part V, para. 25).

334. Part III, paragraph 15 refers to indigenous peoples' "right to recognition of their distinctive and profound relationship with the total environment of the lands, territories and resources which they have traditionally occupied or otherwise used". Further, the draft declaration recognizes their right to maintain and develop within their areas of lands and other territories", their traditional and other economic activities (Part IV, para. 20). Questions of sovereignty closely related to land rights are dealt with also in the preamble, which specifies that "nothing in [the draft] Declaration may be used as an excuse for denying to any people its right of self-determination".

335. Concerning remedies and reparations, the draft declaration provides that indigenous peoples have the right to the restitution of or, where this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent". This compensation should be in kind, with lands of at least equal value to those in question (Part III, para. 17). Part IV, which deals specifically with the right to development, recognizes an indigenous people's right to compensation if it has been deprived of its means of subsistence (para. 20).

336. For indigenous peoples, the loss of ancestral land is tantamount to the loss of cultural life, with all its implications. Awareness of the process of ethnocide is reflected in Part II, paragraph 7 (b), which recognizes indigenous peoples' right to prevention of, and redress for, "any form of forced assimilation or integration by imposition of other cultures or ways of life". The implications for population transfer, including the implantation of settlers, is thereby obvious.

E. World Bank standards

337. Organized mandatory transfer to facilitate infrastructural development in a given region, prima facie appears to be the most benign occasion of population transfer. It may coincide with more pernicious policies involving ethnic discrimination and other human rights violations. However, transfer for development purposes alone also affects the human rights of the target population, and transfer which serves development goals constitutes the source of the majority of the world's displaced populations, including both populations that are internally displaced and cross-border transferees.

338. In an earlier era, the involuntary transfer of populations was unquestioned as a necessary feature of dam, canal and other large-scale development projects. People were transferred, often without any compensation or due process. When compensation was offered, it was usually in monetary form, rarely in that of replacement land. The World Bank has recognized this after decades of funding the transfer of indigenous and tribal peoples to make way for large-scale infrastructural development projects. Bank policies on "involuntary resettlement" have evolved progressively over the past decade. In some cases, these policies have paralleled relevant policies in independent countries, and often the Bank's policy process has influenced the policies adopted by governments. These developments, and in particular the Bank's resettlement guidelines, have emerged in response to international pressure and out of its own latent concern for the human rights of literally millions of persons displaced by development projects, ostensibly carried out to serve some "greater good". This supposition is an ideological one, and a cognitive rationale present also in the conduct of population transfer in war. However, rather than assessing the arguments of statistical relativism, this section focuses solely on the human rights values involved.

339. Since the formation of the Bank, after the Second World War, developing and developed countries alike have rushed to construct high dams, often involving incursions into the territories of indigenous and tribal peoples. It was out of recognition of the special conditions of these populations that measures and operational guidelines emerged to protect transferred

populations, and is this ethnic feature of the practice that draws out the most important link between the development issues involved and the human rights values at stake that are within the Sub-Commission's purview. The Bank guidelines apply to all affected populations, but have derived from the obvious harm that population transfer has brought to indigenous and tribal peoples. The Bank's policy guidelines recognize indigenous and tribal peoples' land ownership as the key to preventing the violation of the affected peoples' human rights.

340. The Bank ultimately rejected enforced isolation as "a zoo-like arrangement", and likewise denounced "complete assimilation into national society" as it "denies, then extinguishes ethnic diversity". 263/ The Bank undertook to establish policy guidelines to avoid many of the negative effects for transferred people, particularly indigenous and tribal peoples. The new policy pursued in 1980 sought to retain for the indigenous and tribal peoples "a large measure of autonomy and cultural choice". 264/

341. According to the Bank, "such a policy of self-determination emphasizes the choice of tribal groups of their own way of life and seeks, therefore, to minimize the imposition of different social or economic systems". In contradiction of its own reference to self-determination for indigenous and tribal peoples in this case, the Bank still asserted the subordination of tribal peoples to State interference in their physical or economic spheres. Instead, inferring that State-sponsored development projects are inevitable, the Bank proceeded to recommend fundamental conditions for a less aggressively assimilationist policy which would cushion tribal and indigenous peoples from the harsh effects of the joint programmes of the Bank and governments. The Bank has stated that:

(i) National governments and international organizations must support rights to land used or occupied by tribal people, to their ethnic identity, and to cultural autonomy;

(ii) The tribe must be provided with interim safeguards that enable it to deal with unwelcome outside influences on its own land until the tribe adapts sufficiently;

(iii) Neither the national nor the non-tribal neighbours should compete with the tribal society on its own lands for its resources. 265/

342. In February 1980, the Bank published an operational manual statement on "Social issues associated with involuntary resettlement in Bank-financed projects", 266/ which provided:

"1. Bank-assisted projects sometimes require that people living in the area be moved to another location, either permanently or for a long period. Such resettlement often causes hardship, disruption and constraint on further development unless appropriate preventive action is taken. This statement describes the policy to be followed by Bank staff in projects that require involuntary resettlement, the procedures for preparing and appraising schemes

for resettlement in such cases, and the conditions that are expected to be met by borrowers and resettlement agencies.

"2. When the development projects require people to be relocated, the Bank's general policy is to help the borrower to ensure that after a reasonable transition period, the displaced people regain at least their previous standard of living and that so far as possible, they be economically and socially integrated into the host communities. Planning and financing the resettlement should be an integral part of the project, and the measures to be taken in this regard should be clarified before, and agreed upon during, loan negotiations." (Emphasis added.)

343. The policy operational manual statement goes on to assume that development projects, including hydropower dams, canals, highways, mining operations, irrigation projects, transmission lines, etc., contribute to the general welfare and may be critical for national and regional development. However, it adds that "measures must be taken to protect the life, welfare and rights of those displaced." The statement also went further to say that, where possible, transfers and resettlement should be avoided. In cases where this was not possible, the Bank had echoed the ILO concept of ensuring advantages to the transferred population in that "the objective is to ensure that [transferees] are afforded opportunities to become established and economically self-sustaining in the shortest period possible, at living standards that at least match those before resettlement". The statement recognizes that the losses of transfer could involve not only economic assets, housing, land and other tangible commodities, but also services and religious sites. It makes the pragmatic point that, for the State to take property and other values from people, government laws and regulations relative to compensation can provide a partial means of reconciling the "national interest to the interests of the groups and individuals immediately affected". But it states also that such measures "very often do not prevent serious hardships and suffering". 267/

344. According to World Bank policy and procedure, an aid-recipient government is theoretically required to have prepared a "workable plan" for adequate resettlement of the affected population; however, to this date it does not go so far as to require consent of the subject people. The human rights criteria set by the World Bank for funding development projects do not, in themselves, represent international law. However, these standards reflect agreement among the donor governments to the World Bank on basic principles of operation. Where these criteria constitute preconditions for funding, they become an issue of a contractual nature that binds both parties to respect and uphold them.

345. Although it was inspired by the harm development had wrought upon tribal and indigenous peoples, the 1980 policy statement did not provide for these peoples specifically. In 1982, the Bank published another policy statement, entitled "Tribal people in Bank-financed projects", 268/ which provided a description of the typical characteristics of tribal and indigenous peoples and recognized the potential benefit the larger society could gain from their store of knowledge and know-how in fragile and marginal environments. That policy as developed firmly established that the Bank "will not assist

development projects that knowingly involve encroachment on traditional territories being used or occupied by tribal peoples, unless adequate safeguards [of their integrity and well-being] are provided". This policy eschews measures which isolate these populations from "national society" and needed social services, as well as those measures that promote forced, accelerated acculturation unsuited to their future well-being. Recognizing the dilemma posed for governments that seek to extract wealth from tribal lands, the Bank asserted none the less that if project sponsors had previously cleared the area of tribal peoples by force, it would not be prepared to assist. That important policy statement also affirmed the principle that relevant projects would need a tribal component that included recognition, demarcation and protection of tribal peoples' territories - even in the absence of legal titles 269/ - containing the resources needed to sustain them.

346. In its 1990 Operational Directive the Bank re-emphasized the principles protective of the human rights of transferred populations, asserting once again that "involuntary resettlement should be avoided or minimized where feasible, exploring all viable alternative designs". Although the Bank's relevant policies have mitigated the worst of the human rights violations of those affected by Bank-financed development, they have yet to be consistently applied or enforced.

F. Developing legal opinions

347. The International Law Institute (Paris) addressed the question of "international population transfers" at its annual session at Sienna in 1952. 270/ Reflecting global concern at the nature and legality of cross-border transfers, the Institute's report and questionnaire acknowledged the inadequacies of its own, narrow definition of the phenomenon, particularly in the light of the comparable human rights consequences and other legal questions attendant on population transfers within States. All but one of the 11 respondents 271/ implied or stated in their replies to the questionnaire that, because of the human rights dimensions of transfer, domestic population transfers were, perforce, the subject of international law.

348. With reference to relevant cases emerging from conflict in the first half of this century, the respondents discussed the minority nature of subjects of population transfer and emphasized the need for their protection as such from the politically motivated actions of State. Although recognizing the citizen's obligation of loyalty to the State, several of the experts viewed with suspicion arguments that claimed the presence of minorities in itself constituted a legitimate motive for their transfer. One suggested that transfers proposed on such a basis placed a burden on the State to prove beyond doubt that it had scrupulously honoured human rights in general, and minority rights in particular. 272/ A sole respondent asserted the State's absolute right to act as long as "laws of humanity" were not violated. 273/

349. Most consistently, respondents determined that, for population transfers to be legitimate, they must be voluntary and the prospective transferees must have the option to remain in their original homes if they preferred.

Therefore, it was not sufficiently legitimate or legal for population transfers to be based on an accord between two or more States, and the human rights concerns superseded reasons particular to or common among States. 274/ Moreover, a legitimate transfer must serve the affected population. 275/ Doubt was cast on the common assertion that population transfer could enhance stability and peace, but it was maintained that such a policy might just as well disturb peace and good relations among nations. 276/ Similar scepticism was expressed with regard to notions of "voluntary transfer" as contradictio in terminis. 277/ More customary to population transfer were the elements of "discrimination, despoliation, arbitrary police action, menacing of minorities, devastation of war and imperialist annexations". 278/ In the light of these and other conditions of population exchanges carried out in this century, the International Law Institute characterized these exchanges as a human rights "trade-off", at best.

350. The Polish expert transcended the original definition to observe that three categories of population transfer were to be addressed by international law: international transfers, internal transfers and transfers involving the rights and obligations of belligerent occupiers. 279/ Others concurred that population transfer must never serve the acquisition of new territories, and such actions as the implantation of settlers only lead to future revindication. 280/

351. In the International Law Institute's 1952 debate, legal opinions varied from regarding population transfer, like exile, as a painful cruelty contrary to the code of civilized nations, 281/ to regarding it as a legitimate act of State conditioned by humanitarian standards. While the latter position may appear to favour leniency towards State prerogatives, the condition itself may actually amount to a proverbial prohibition. The Institute reported that Woodrow Wilson's exhortations were consistent with existing legal principle, such that "peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game". 282/

352. However, law and parallel political trends have evolved since the First World War, and acceleratedly developed over the past four decades. Whereas the second decade in the present century saw attempts at resolving perceived minority questions through bilateral treaty, the pattern following 1945 favoured assimilation. In the present era, irrepressibly, peoples and minorities seek to transcend the bygone standards of assimilation to reclaim recognition of their rights as a group, including their right to their secure place to live without transfer.

353. Already in 1952, several of the ILI respondents counselled the need for authoritative international mechanisms for enforcing minimum human rights conditions on the transfer of populations. 283/ Rapporteur Giorgio Balladore Pallieri proposed that the international community resort to a convention to prevent and punish violations associated with population transfer, based on the example of the Genocide Convention, which treats a far less frequent offence. He noted with regret, however, that for this the international reaction to population transfer had not yet raised sufficient indignation to act, nor had public opinion adequately matured.

354. The International Law Association (ILA), during its sixty-second conference held at Seoul in 1986, adopted the Declaration of Principles of International Law on Mass Expulsions. Defining "expulsion" in the context of the Declaration as "an act or a failure to act, by a State, with the intended effect of forcing the departure of persons against their will from its territory for reasons of race, nationality, membership of a particular social group or political opinion", the Declaration enumerates 20 principles of international law as applicable to situations of mass expulsion and calls upon States to observe scrupulously these principles in their conduct towards nationals and aliens alike.

355. The principles refer, inter alia, to the Universal Declaration of Human Rights, which presupposes a person's ability to live in his own country if he so chooses, the Genocide Convention, the Geneva Conventions and Additional Protocols and the ILC draft articles on State responsibility. ILA Principle 9 provides:

> "Where an 'international crime' has been committed through e.g., mass expulsions of citizens for reasons of genocide, apartheid, or other serious and large-scale breach of human rights, the international community as a whole should, under the coordination of the appropriate United Nations organ, provide the following sanctions:
>
> (a) Not to recognize as legal the situation created by such crime; and
>
> (b) Not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime." 284/

356. Principle 14 states:

> "Compulsory transfer or exchange of population on the basis of race, religion, nationality or membership of a particular social group or political opinion is inherently objectional [sic], whether affected by treaties or by unilateral expulsion."

357. Principle 19 urges States to avoid mass expulsions and to establish early warning systems. 285/

G. Others

358. Largely owing to the influence of Lenin, the autonomy of nationalities in the Soviet Union was formally recognized administratively and in the Soviet Constitution. Constituent nations and peoples of the Soviet Union were promised the right to self-determination; however, in practice, it was usually negated or denied. In the 1940s, Baltic and Caucasian nationalities, for example, were subjected to population transfer, including the implantation of settlers and transfer of the groups' children.

359. However, in 1987, the Soviet Government admitted that the transfer of the Crimean Tatars (Krymly) was illegal. Further, on 14 November 1989, the Supreme Soviet considered the history and consequences of Joseph Stalin's

population transfer policies. It adopted the Declaration on the Recognition of the Illegal and Criminal Nature of the Repression of Peoples Subjected to Forcible Deportation and on the Observance of Their Rights. The Declaration called for the "unconditional restoration" of those rights and provided a political, legal and moral appraisal of Stalin's arbitrary rule as a "crime against the Soviet peoples". In its Declaration, the Supreme Soviet characterized the transfer of Kalmyks, Crimean Tatars, Germans, Meskhetian Turks, Ingushes and northern Caucasus peoples from their birthplaces as "barbarous acts" and "a most grievous crime, counter to the nature of Socialism and democratic and legal principles". The Declaration further asserted that these acts were "never to be repeated". 286/

360. Following in the same vein, the Commonwealth of Independent States (CIS) agreed to principles at its July 1992 summit which affirmed the rights of deported individuals, national minorities and peoples. 287/ The CIS working group completed a draft agreement for submission to the September 1992 summit, which envisages joint efforts to address some of the social problems of the deportees. Proposed measures include ensuring guarantees for pensioners and both assistance and tax relief for those resettling in their original territory. 288/ However, the Meskhetian Turks presumably would not benefit from the agreements, since Georgia is not a member of the Commonwealth.

361. During the first year of the Commonwealth's existence, the CIS heads of State and government have signed some 250 agreements. Most of these have not yet been implemented, and many have not yet been ratified by the member State parliaments. At the time of writing, the final status of the agreements pertaining to historic deportees is yet to be determined.

IX. PRELIMINARY CONCLUSIONS

362. In spite of all the rationale employed over the centuries to promote the putative advantages of population transfer, the International Law Institute recognized already in 1952 that international population transfer is never a means to protect human rights. "On the contrary", the ILI rapporteur emphasized, "it is a means of satisfying certain rights which the State claims ... " 289/ To suggest that population transfer somehow works to the advantage of the affected populations, then, is to fail to make the important distinction between the interest of the individual and the interest of the State.

363. This relates to the issue of voluntariness; for if such shifting of population were truly voluntary on the part of all parties concerned, as human rights law would seem to require, only spontaneous movements of people would occur and the enforcement apparatus of the State would not be engaged in the process. Nor would there be the need to investigate the human rights dimensions of population transfer, including the implantation of settlers.

364. The disparate elements of international human rights law indicate the developing right of individuals and groups not to be subject to population transfer, either as participants or as recipients. The cumulative rules of existing and emerging human rights and humanitarian law are consistent with a legal prohibition against most known forms of population transfer.

A. Some problems of international law

365. Existing conventional law has proved ineffective, however, in protecting individuals and groups from the effects of population transfer. For the purpose of this discussion, one present deficiency in the law lies in the fundamental ideological assumption that nation and State are congruent concepts. In reality, such an assumption is rarely valid. It remains, none the less, a living tenet of State ideology that the State and the national unit should be collinear and synonymous. This leads to the dismissal or denial of distinct identities, or even the presence, of minorities and results in degradation of the status and conditions of peoples which predate the dominant group. The single-nation concept has been instrumental to the historical and contemporary reasoning in favour of the forcible and coercive removal of certain people from their homes and lands by more powerful groups.

366. The implementation of relevant international law is constrained by the goals of States to pursue modern, economic progress and "national development" and the assumption that States themselves are the entities which enjoy absolute legal claim to eminent domain as a right of State sovereignty. Claims that local populations or minority ethnic groups within the boundaries of States should exercise their rights to their lands and destinies are still interpreted as secessionist and, therefore, continue to face denial and rejection. The State's power to arrogate peoples' lands in "the national interest" is upheld by the dominant political forces which draft and interpret international law. Furthermore, the effect of much liberal human rights activity and law making pertaining to minority, indigenous, tribal and other vulnerable peoples typically subject to population transfer is merely to cushion them against the worst effects of the State's action. 290/ It is therefore questionable that this could be interpreted as "protection".

367. Thus, a competition of values is at play in the high-stakes dynamic between the dominant, State-oriented groups and the groups susceptible to population transfer. That is, the official "national identity" may be enforced at the probable risk of human rights abuses of the "others", leading to costly resistance and/or intercommunal conflict. With an eye to historical and current issues related to population transfers, the prospects of resistance and long-term or atavistic conflicts are sure to result from almost all transfer policies. At stake are a bundle of human rights values, human diversity and, sometimes, the State itself. In order to respect the diversity inherent in a plural society and avoid the incalculable losses associated with the effects of population transfer, States are challenged to arrive at alternatives through which international law can take precedence over ethnocentrism and other ultimately impractical forms of State ideology. At the same time, to meet this challenge law must be stronger and more specific.

B. Gaps in legal protection

368. Gaps in protection exist in non-international armed conflict and conflictive situations not involving the use of arms. Particularly in cases not amounting to situations where explicit humanitarian law provisions are applicable, the implantation of settlers is inadequately regulated. In such cases, the population transfer can be insidious, incremental and thus

"hidden", allowing the transferring agent (the State) to assert plausible deniability before charges of unlawful action.

369. Many of the applicable rules bind only ratifying parties, and the universal rules applying to war or armed conflict have seldom been enforced (for example as required of High Contracting Parties to the Civilians' Convention), whether through diplomatic, legal or other means. Self-interest, complicated by unresolved matters of jurisdiction in some cases, have prevented States from taking a position which would preserve peace and security and fulfil human rights.

370. Gaping inadequacies persist with regard to the protection of indigenous peoples against forced removal. The rights of nations and peoples are explicit in humanitarian and human rights instruments; however, the definitions of these subjects remain elusive. This may create a problem to be reckoned with in the instance of a formal legal review of specific self-determination claims.

371. Legal effect concerning population transfer has been so far inadequate in the light of the current reality of human suffering. States frequently lack the political will to conform even with obligations jus cogens, erga omnes, or of customary law. Exception clauses leave States with a large margin of discretion to use "public purpose", "national security", "development", or "military necessity" as justifications for transfer processes. Particularly where protection against practices of population transfer has to be inferred from general human rights and other international legal norms pertinent to the practice, violations occur. Non-ratifying States claim exemption, while some ratifying States exonerate themselves by citing extenuating reasons why, in their case, particular legal rules should not apply.

C. Trends towards further legal development

372. Although most population transfers violate established principles of fundamental human rights, there is no legal code that universally prohibits population transfer as such. In spite of the wealth of historical information on the conduct and negative human rights consequences of various forms of population transfer, there is not yet the assumption that population transfers are unlawful unless justifiable on grounds similar to those permitting the derogation of rights in democratic society.

373. A number of ongoing and potential conflicts absorbing the world's attention today involve population transfer, including the implantation of settlers. As Ian Brownlie has concluded,

> "these [population transfer and demographic manipulation] practices make more difficult the process of reaching a constructive outcome. The practices involved should be recognized as having a character of their own and deserving a clearer profile as a wrong to international public order". 291/ Where law is tacit, the politics of crude power flourish.

374. The political will may now exist to initiate development of a legal instrument. There is evidence, as in the strong verbal response by the

international community to "ethnic cleansing" in the former Yugoslavia and to other longer-known cases of population transfer, of a trend towards wider recognition of both the problems posed by population transfer - as an offence having a character of its own - and the need for legal clarification. Political will to ban the practice and its inherent elements of racism and ethnic targeting is growing and may now be sufficient to move at all levels towards a relevant international legal code.

D. Potential remedies

375. Any legal instrument to arise from an effort to protect against population transfer should, at a minimum, emphasize as requirements informed and free consent of the affected population, non-discrimination and full, democratic participation in decisions concerning the question of transfer. Civil, political, economic, social and cultural rights must be specifically and integrally protected, and self-determination must be upheld as a cardinal principle. All force, coercion and pressure, either direct or indirect, must be recognized as unlawful and prohibited, and the State's responsibility to protect against these violations should be affirmed. Such protections should apply to citizens and to non-naturalized residents of the State. In order for any transfer of population to be permissible under law, it must be demonstrated to be voluntary on the part of participants and receiving (host) populations. Such motives as fear and desperation cannot be admissible as voluntariness.

376. A specific legal instrument should clarify that population transfer is, prima facie, unlawful and elaborate the circumstances under which, in exceptional cases, population transfer would be permitted, or even be imperative. Such an instrument would also have to regulate the consequences. It should confer beyond reasonable doubt the criminal responsibility on responsible actors, allow for remedies, and provide for early warning and other preventive machinery. It should also address the serious human rights consequences for all groups affected, including the status of implanted settlers themselves, as well as national and international security, peace and stability issues.

377. A declaration, convention or other set of legal principles would also have to deal with the issue of remedies. As noted above, the draft declaration on the rights of indigenous peoples introduces the idea of remedy for harmful policies through the assessment of reparations to victims of ethnocidal policies. However constructive the concept, it remains for the future to work out the practical meaning of such remedies for the losses related to population transfer. The conventions on genocide and apartheid may offer the best alternative practical possibilities, but, as also noted previously, application of neither has been successfully attempted.

378. The ILC draft code of crimes against the peace and security of mankind, however helpful, may not be specific enough to meet the task of protecting rights in the face of a State's will to transfer population, especially within its borders. The ILC articles on international liability for injurious consequences arising out of acts not prohibited by international law may fill some gaps in matters of a State's responsibility for "lawful" activities within its territory, jurisdiction or control which have harmful effects on

neighbouring States. The commentary on these articles does not specifically focus on population transfer; however, the principles suggest that their primary relevance to population transfer may be in seeking remedy in cases of cross-border transfer as the unintended effect of an act not prohibited by law. Such articles thus would indemnify a State from bearing the consequences alone for, say, the collateral environmental damage or nuclear disaster created in another State. This could relate to economic projects or policies having the result of population transfer across borders, for instance. 292/

379. Draft article 3 on international liability assigns obligations to States and explicitly presumes that "the State of origin has the knowledge or the means of knowing" that the activity at issue is, or has been carried out in the territory under its control. Importantly, this article affirms the concept of the State's direct and third-party responsibility to protect individuals and other juridical persons from harm within the province of its control.

380. Similarly, the draft articles on State responsibility concern themselves mainly with infringement of rights of sovereignty and other internationally wrongful acts of State. However, human rights form part of the body of rights affected by an internationally wrongful act. Draft article 5(e) (iii) identifies "injured State" to mean that "the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, if it is established that ... the right has been created or established for the protection of human rights and fundamental freedoms". 293/

381. Among the objectives of these draft articles is to develop standards for remedies and countermeasures to such internationally wrongful acts. The debate on the nature of the appropriate recourse has involved a range of opinions on the legality of economic coercion. According to the Special Rapporteur of the International Law Commission, human rights has a substantive limitation on the faculty of the injured State(s) to take countermeasures. 294/

382. International law alone, certainly in its current stage of development, cannot solve many of the problems of population transfer. Policies and practices resulting in population transfer can evolve from historical processes. Assuming the political will to do so in such cases, resulting problems must be resolved through negotiations guided by existing human rights principles derived from general rules. These are not specific enough to relate adequately to population transfer, and past practice is not a constructive basis for action. The development of law on this global human rights problem of war and peace is long overdue.

X. PRELIMINARY RECOMMENDATIONS

383. It is the view of the Special Rapporteurs that the future activity of the Sub-Commission on population transfer should focus on future legal developments to address all aspects of this human rights problem. In particular, it is proposed to review in greater detail arguments used to justify population transfer and the delicate problem of community versus

individual interests. The next report should also include discussion of the substance of possible recommendations for applicable standards. This would give attention to the minimum conditions for transfers to comply with established and emerging human rights law. It should also explore the possibility of remedies available to victims of population transfer and the need for a tailor-set standards in view of the special nature of the subject matter. The adequacy of traditional modes of reparation has to be explored in this connection.

384. Regarding further action in this particular field the following recommendations are made to the Sub-Commission:

(a) The Sub-Commission should invite the Secretary-General to seek the views (and advice) of Governments, relevant United Nations bodies, intergovernmental organizations and non-governmental organizations on future human rights protection, procedural recommendations and possible remedies to address population transfer.

(b) The Sub-Commission should invite the Special Rapporteurs to take into consideration in preparation of their progress report historic and contemporary situations of population transfer based on relevant materials received from governments, intergovernmental organizations, United Nations bodies, non-governmental organizations and other specialized organizations.

(c) The Sub-Commission should invite the Special Rapporteurs to include in their next report relevant decisions and general comments of the treaty monitoring bodies.

(d) The Sub-Commission may wish to consider inviting the Special Rapporteurs to undertake on-site visits to diverse, ongoing cases of population transfer selected on the basis of information received for the next report. The purpose of such visits would be to consider potential conditions on the ground and to discuss prospective approaches with representatives of all parties involved at various levels. Such a mission would complement research on the various population-exchange and transfer arrangements which have implications for current and potential conflict situations. Both documentary research and local fact-finding are foreseen as serving an eventual early-warning system proposed within the United Nations system, including efforts of the Office of Research and the Collection of Information (ORCI).

(e) The Sub-Commission may wish to consider inviting the Commission on Human Rights, at its fiftieth session, to request the Secretary-General to organize a multidisciplinary expert seminar prior to the preparation of the final report, in order to formulate appropriate final recommendations and conclusions.

(f) The Sub-Commission may wish to invite the Special Rapporteurs to conduct a survey of relevant jurisprudence on the issue. Such efforts should be strengthened by periodic contacts with Governments, and with United Nations bodies and specialized agencies. To this effect, an improved level of coordination should be maintained with other Special Rapporteurs and Special

Envoys of the Secretary-General with a view to further integration and maximization of efforts on related issues.

385. All these efforts would rely on the Centre for Human Rights to support the Special Rapporteurs' work with all the assistance required.

386. With the present study, the Sub-Commission has the opportunity to contribute to filling a void in existing international law in an area of burning, contemporary significance and practical under-response. It could not have been predicted when the first Sub-Commission resolution on population transfer was adopted in 1990 that this form of human rights abuse would become so central to conflicts and pressing political issues of which the international community is now seized. However, with special regard to these realities, it is the hope of the Special Rapporteurs that they will be enabled to proceed with vigour, keeping in mind the substance and practical steps outlined in the present report.

Notes

1/ Estimate of 15,293,833 in UNHCR, "Global Refugee Statistics" (Washington: UNHCR, September 1992). However, this number omits 2,519,487 Palestine refugees registered with UNRWA. Uncounted, as well, are refugees and displaced persons from the civil war and invasion of Lebanon, where some 90 per cent of that country's approximately three million population has been forced from their homes. UNHCR may undercount refugees of various origins in Iran by some one million, as compared with estimates elsewhere. Cypriot refugees, including the approximately 265,000 civilians expelled or forced to flee during the August 1974 invasion and all subsequent expulsions and forced "exchanges", are similarly left out.

2/ Primarily internally displaced persons, estimated to exceed 20 million in such sources as U.S. Committee for Refugees World Refugee Survey 1993 (Washington, U.S. Committee for Refugees, 1992); Africa Watch (New York); Hemispheric Survey Project, CIPRA, Georgetown University (Washington); Refugee Policy Group (Washington). The Secretary-General's analytical report on internally displaced persons cited 24 million (E/CN.4/1992/23, para. 5).

3/ For a general discussion, see Gil Loescher, "Mass Migration as Global Security Problem", in World Refugee Survey 1991 (Washington, U.S. Committee for Refugees, 1991), pp. 7-14.

4/ Francis M. Deng, "Comprehensive study on the human rights issues related to internally displaced persons", E/CN.4/1993/35, para. 178.

5/ Asbjorn Eide, "Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities", E/CN.4/Sub.2/1992/37, p. 30.

6/ E/CN.4/Sub.2/1992/11.

7/ In its resolution 1992/22, the Sub-Commission invited its Special Rapporteur to submit his report to the Commission on Human Rights at its forty-ninth session. That fifth report, revised and updated (E/CN.4/Sub.2/1992/23/Rev.1), was transmitted by the Secretary-General in document E/CN.4/1993/27.

8/ E/CN.4/1993/35, 21 January 1993 submitted pursuant to Commission on Human Rights resolution 1992/73 of 5 March 1992.

9/ For example, the Commission decided in resolution 1992/17 to extend for three years the mandate of the Special Rapporteur on the implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Angelo Vidal d'Almeida Ribeiro. See the report of the Special Rapporteur, E/CN.4/1993/62, and the report of the Secretary-General E/CN.4/1993/63.

10/ Report of the Secretary-General, on human rights and mass exoduses, A/44/622, 17 October 1989; and General Assembly resolution A/RES/45/153 of 1 March 1991.

11/ See General Assembly resolution 46/127 requesting the Ad Hoc Working Group to submit its report on the early-warning mechanism to be established, and the subsequent report.

12/ See resolutions 1991/12 of 26 August 1991 and 1992/14 of 27 August 1992 of the Sub-Commission.

13/ Commission on Human Rights resolution 1993/77 of 10 March 1993.

14/ See working paper by the Special Rapporteur on the right to housing, Rajindar Sachar, E/CN.4/Sub.2/1992/15.

15/ For the argument linking housing rights denial with "inhuman or degrading treatment", which applies in the context of article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, see Scott Leckie From Housing Needs to Housing Rights: An Analysis of the Right to Adequate Housing under International Law (London, International Institute for Environment and Development, 1992), p. 46.

16/ Danilo Türk, Final report on the realization of economic, social and cultural rights, E/CN.4/1992/16, with its special focus on the effects of structural adjustment, including the displacement of vulnerable populations resulting from state-directed and World Bank-financed development.

17/ See Barbara Harrell-Bond, Imposing Aid (Oxford, Oxford University Press, 1986); and Beatriz Manz Refugees of a Hidden War (Albany, State University of New York Press, 1988).

18/ For example, article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965).

19/ The legality of this practice has been unsuccessfully challenged in the United States Supreme Court; however, some compensation for victims in that country has been awarded through recent legislation. Japanese-Americans were denied relief in Hirabayashi v. United States, 320 U.S. 81 (1943) and Korematsu v. United States, 323 U.S. 214 (1944), but the injustice of their transfer and internment was acknowledged with the signing of HR 442 into law in 1987, forty-six years after the fact. The legislative gesture offered to the victims the token compensation of $20,000, paid over 10 years. Japanese-Canadians were similarly affected during the Second World War.

20/ See Joseph B. Schechtmann, "The option clause in the Reich's treaties on the transfer of population", American Journal of International Law vol. 38, No. 3 (July 1944), pp. 356-74.

21/ Timothy A. Taracouziou, The Soviet Union and International Law (New York, Macmillan, 1935), p. 97.

22/ See "Israel helping arm Ethiopia in spite of U.S. opposition", Washington Star, 18 January 1976; also section 2754 of the United States Arms Export Control Act; "Storm breaks over 'Operation Moses': Israel's Palestinians question the airlift of 12,500 Ethiopian Jews", al-Fajr (international edition), 11 January 1985; Richard H. Curtiss, "Airlift culminates 17 years of secret Israeli links to Mengistu Government", Washington Report on Middle East Affairs, (July 1991), pp. 48-50; Jennifer Parmelee, "Falashas still 'wishing for the good life' in Israel: For now, Ethiopian Jews live in squalor", Washington Post, 19 April 1991.

23/ "Soviet Jews: Whose humanitarian concern?" (Washington, Settlement Watch, 1992).

24/ Testimony of Patricia Adams of Energy Probe to the U.S. Senate Appropriations Committee, Subcommittee on Foreign Operations, 1 May 1986; cited in Marcus Colchester, "The social dimensions of government-sponsored migration and involuntary resettlement: policies and practice" (Geneva, Independent Commission on International Humanitarian Issues, January 1986), p. 7.

25/ Alexander De Waal, Evil Days: Thirty Years of War and Famine in Ethiopia (New York, Human Rights Watch, 1991). For example, data among resettled populations may have been falsely attributed to general famine, whereas similar demographic indicators were found among those at resettlement sites in both famine and non-famine zones; also alluded to in "Analytical report of the Secretary-General on internally displaced persons", E/CN.4/1992/23, para. 50.

26/ Anil Agarwal, The State of India's Environment: 1982 (New Delhi, Centre for Science and the Environment, 1982).

27/ See E. Goldsmith and N. Hilyard, eds., The Social and Environmental Effects of Large Dams, 2 vols. (Camelford, Wadebridge Ecological Centre, 1986).

28/ World Bank, Social Issues Associated with Involuntary Settlement in Bank-financed Projects: A View of OMS 2.33 (Washington, World Bank, 1984).

29/ This figure was corroborated by research reported separately by Manab Chakraborty, "Resettlement of large dam oustees", Lokayan Bulletin (1986); and Walter Fernandes and Enakshi Thukral, Development Displacement and Rehabilitation: Issues for a National Debate (New Delhi, Indian Social Institute, 1989).

30/ See, for example, Nicholas P. Canny, "The ideology of English colonization: From Ireland to America", William and Mary Qtrly., 3d Ser., XXX (1973), 575-598; also Francis Jennings, The Invasion of America: Indians, Colonialism and the Cant of Conquest (New York and London, W.W. Norton, 1976).

31/ Eide, op. cit., pp. 15-19.

32/ Ibid., pp. 16-17.

33/ General debate was initiated by Survival International; see their "Ethiopia's resettlement programme: an evaluation" (London, Survival International, 1985).

34/ Marcus Colchester and Virginia Luling, eds., Ethiopia's Bitter Medicine: settling for disaster (London, Survival International, 1986); Peter Niggli, Ethiopia: Deportations and Forced Labor Camps: doubtful methods in the struggle against famine (Berlin, Berliner Missionwerk, 1985); Virginia Luling, "Ethiopia: resettlement, villagisation and the Ethiopian peoples", IWGIA Newsletter, No. 47, pp. 27-39.

35/ In a West-African case, land-based people were ultimately given only 6,000 ha. to replace their loss of 75,000 ha. to a dam project. The Lake Volta scheme in Ghana proposed 21,600 ha. replacement land, but this amount was ultimately unavailable. Henri Roggeri, African Dams: Impact on the Environment (Nairobi: Environmental Liaison Centre, 1985), at 20.

36/ Bradford Morse and Thomas Berger, Sardar Sarovar: The Report of the Independent Review (Ottawa, Resource Futures International, 1992), p. 44.

37/ The Portfolio Management Task Force, Wapenhans Report.

38/ Land for Public Purposes: Guidelines (Nairobi, UNCHS, 1985), p. 8.

39/ For example, see R. Soebiantoro, "Transmigrasi dengan prospek prosperity dan security" (Jakarta, Directorate General for Transmigration, 1971) mimeo, p. 17, cited in Joan Hardjono, "Spontaneous rural settlement in Indonesia," Spontaneous Settlement Formation in Rural Regions (Nairobi, United Nations Centre for Human Settlements, 1986), pp. 50-70.

40/ See for example, Ulrich Scholz, "Spontaneous rural settlements and deforestation in South-East Asia: Examples from Indonesia and Thailand", Spontaneous Settlement Formation in Rural Regions, op. cit., pp. 13-34.

41/ The sale of forest products is an important source of monetary income for many tribal people in India, for example, amounting to as much as 30 per cent of total earnings. The State of India's Environment a citizen's report, 1984-85 (New Delhi Centre for Science and the Environment, 1985), p. 91.

42/ As exemplified in the continued prevalence of the sickle-cell trait and sickle-cell anaemia among those transferred from Africa to North America for purpose of slavery and their descendants.

43/ R. Mansell Prothero, "Disease and Mobility: A Neglected Factor in Epidemiology" Working Paper 26 (Liverpool University of Liverpool, Department of Geography, African Population Mobility Project, 1976), p. 14.

44/ World Bank, "The relocation component in connection with the Sardar Sarovar (Narmada) project" (unpublished ms., 1982); Prothero, op. cit.; see also Thayer Scudder and Elizabeth Colson, "From welfare to development: A conceptual framework for the analysis of dislocated people", in Art Hansen and Anthony Oliver-Smith, eds., Involuntary Migration and Resettlement: The Problems and Responses of Dislocated People (Boulder, Westview Press, 1982), pp. 267-86.

45/ Scudder and Colson, op. cit.; also, Joseph Schechla, The Price of Development: Environment, Housing and People in India's Narmada Valley (Mexico City, Habitat International Coalition, 1992), p. 10.

46/ Scudder and Colson, op. cit., p. 271.

47/ Kashyap Mandal, "Learning from the Ukai experience" (Surat, Centre for Social Studies, 1982).

48/ Scudder and Colson, op. cit., p. 270.

49/ See, for example, Schechla; also Survival International, "Ethiopia's Resettlement Programme", op. cit.

50/ The term emerged during the 1960s and was apparently first published by French anthropologist Robert Jaulin in La Paix Blanche (Paris, Editions de Seuil, 1970).

51/ For a survey of social science definitions of ethnocide, see Marc A. Sills, Ethnocide and Interaction between States and Indigenous Nations: A Conceptual Investigation of Three Cases in Mexico (doctoral dissertation, Graduate School of International Studies, University of Denver, June 1992), pp. 1-41. See also Rodolfo Stavenhagen The Ethnic Question: Conflicts,

Development and Human Rights (Tokyo, United Nations University Press, 1990), pp. 85-93.

52/ Thayer Scudder, The Development Potential of New Lands Settlement in the Tropics and Subtropics: A Global State-of-the-art Evaluation with Specific Emphasis on Policy Implications (Binghampton, New York, Institute for Development Anthropology, 1981); also Thayer Scudder, "A social science framework for the analysis of new lands settlements in the tropics and subtropics", in Michael Cernea, ed., Putting People First: Sociological Variables in Development Planning (London, Oxford University Press for the World Bank, 1985).

53/ Survival International, International Rivers Network, Environmental Defense Fund, Antislavery Society, Earth Island Institute, Anthropology Resource Center, World Bank, and volumes of reports and analyses of forced removals in South Africa, Namibia, the indigenous world, Palestine, etc.

54/ Consider cases in which armed resistance has emerged in response to planned resettlement, particularly involving an ethnic component: Manz, op. cit.; Charles Drucker, "Dam the Chico: Hydropower Development and Tribal Resistance", The Ecologist vol. 15, No. 4 (1985), 149-57; and M.Q. Zaman, "Crisis in Chittagong Hill Tracts: Ethnicity and Integration", Economic and Political Weekly vol. XVII, No. 3 (January 1982), pp. 75-80.

55/ Michael Cernea, Involuntary Resettlement in Development Projects: Policy Guidelines in World Bank-financed Projects (Washington, World Bank, 1988), p. 15.

56/ Note the statement in one World Bank publication which asserts that "involuntary resettlement is often an unavoidable aspect of many urban development projects and the volume of people who must be displaced in the name of progress is sure to grow as the world's urban populations increase". (World Bank, "Coping with involuntary resettlement", Urban Edge, vol. 13, No. 2 (March 1989), p. 6.

57/ "Conflict is a powerful organizing principle of behaviour, for defining friends and enemies, good and bad, in terms of immediate, transitory purposes" notes Peter Marris, Loss and Change, second edition (London, Routledge & Kegan Paul, 1975), p. 159.

58/ For example, under common article 1 of the Civilians Convention (1949), which obliges High Contracting Parties to "ensure respect" for the terms of that convention.

59/ Protocol No. 1 of the Treaty of Constantinople, 16-29 September 1913.

60/ Treaty between the Allied and Associated Powers and Bulgaria, signed at Neuilly-sur-Seine on 27 November 1919, entered into force on 9 August 1920.

61/ Treaty of Neuilly-sur-Seine, article 177 (b).

62/ See Carlile A. Macartney, National States and National Minorities (Oxford, Oxford University Press, 1934); also "The exchange of minorities and transfers of population in Europe since 1919", Part I, Bulletin of International News, vol. XXI, No. 16 (July 1944), p. 580.

63/ Ibid., p. 581, citing a report of the Mixed Commission.

64/ Stephen P. Ladas, The Exchange of Minorities: Bulgaria, Greece and Turkey (New York, Macmillan, 1938).

65/ The director of the Refugee Survey reported an additional 55,000 Bulgarians had emigrated by 1934. Sir John Hope Simpson, Refugees: A Preliminary Report of a Survey (London, Royal Institute of International Affairs, 1938).

66/ Signed by the Greek and Turkish Governments on 30 January 1923; the Treaty of Lausanne replaced the Treaty of Sèvres of 10 August 1920.

67/ 10 June 1930.

68/ Amounting to £9,970,000 in 1924 and £3,000,000 in 1928.

69/ At £1,539,511, but the Government was only able to spend approximately £2 per immigrant, compared with £80 per family in Greece.

70/ See "The exchange of minorities ...", p. 588.

71/ Convention of Bucharest, 4 September 1936.

72/ The Treaty of Peace with Estonia, 2 February 1920; Treaty of Peace with Latvia, 11 August 1920; Treaty of Peace with Lithuania, 12 July 1920, and subsequent Agreement of 18 June 1929; Treaty with Finland, 14 October 1920; Treaty with Turkey, 16 March 1921; Treaty of Peace with Poland, 18 March 1921.

73/ 28 September 1939.

74/ The Italians announced the agreement on 22 October 1939, but the terms were published on 21 December 1939.

75/ "The exchange of minorities and transfers of population in Europe since 1919", Part II, Bulletin of International News, vol. XXI, No. 18 (August 1944), p. 660.

76/ About 6,000 were reported transferred by mid-August 1940. "German land and folk: When dictators compromise — the Tirolese bargain", The Times (London), 16 August 1940, p. 11, column 6.

77/ It was reported in Deutsche Umsiedlungs-Treuhand Gesellschaft (German Resettlement Trust) for 1942 that the deadline would be extended to 31 December 1943 owing to the exigencies of the war and the large number of transfer applicants under the agreement. This report may have had propagandist motives. Cited in "The exchange of minorities", op. cit., p. 661.

78/ Germany set it at 12 billion lira, Italy at 5 billion; a compromise was struck at 7-9 billion lira. "Italian trade with Germany: Tirol transfers", The Times (London), 26 February 1940, p. 5, column 3.

79/ Some transferees disposed of their property privately, but details of compensation through the Mixed Commission remains unknown, though any such payments are presumed to have been in cash.

80/ For instance, only 1,200 housing units were built in North Tirol between 1933 and 1940, where resettlement of the Süd Tirolers required 10,000 new units in the immediate term. Frankfurter Zeitung, 16 January 1940; cited in "Transfers of population in Europe", Part II, op. cit., p. 661.

81/ Ibid.

82/ "Protocol on the Resettlement of the German Folk-group in the German Reich", 15 October 1939; see Riigi Teataja (Official Estonian Gazette), 1939, Part II, pp. 341-46. Also "Treaty on the Resettlement of Latvian Citizens of German Nationality in the German Reich", Valdibas Vestnesis (Latvian Official Gazette) No. 247, 30 October 1939, pp. 4-7.

83/ Of whom 56,441 were Latvian citizens (Volksdeutsche).

84/ In a Tass communiqué, 14 October 1939; cited in "Exchange of minorities", Part II, op. cit., p. 662.

85/ The total wealth of the German Estonians, for example, was estimated at £10-20 million, which became a foreign exchange asset under the agreements.

86/ See discussion in Joseph Schechtmann, "The Option Clause in the Reich's Treaties on the Transfer of Population", American Journal of International Law, vol. 38, No. 3 (July 1944), p. 359.

87/ Some 3,000 in Estonia and 12,000 in Latvia.

88/ Monatschrift für Auswärtige Politik (November 1940).

89/ Treaty of Moscow, 16 November 1939; Accord of Moscow, 5 September 1940; and Convention of Moscow, 10 January 1941.

90/ These were estimated in Polish statistics at 90,000, and at 120,000 by German sources. Schechtmann, op. cit., p. 365.

91/ Frankfurter Zeitung, 5 November 1939, bearing the dateline of Moscow, 4 November 1939.

92/ 5 September 1940, negotiations began in June 1940. Figures from Deutsche Umsiedlungs-Treuhand Gesellschaft (German Resettlement Trust) report of 1943; cited in "Exchange of minorities", Part II, op. cit., p. 664.

93/ According to Schechtmann, op. cit., the agreement did not include an option clause; however, "The exchange of minorities", Part II, op. cit., cites 112,000 persons born or with domicile in the ceded territories as returning there from Romania under the agreement.

94/ Convention of Bucharest, 22 October 1940 was announced in German press, 24 October 1940; transfer began in December.

95/ 21 August 1940.

96/ "The exchange of minorities," op. cit., p. 666.

97/ These include the Arrangement of Belgrade (Yugoslavia and Italy), 1 March 1939; Berlin Accord (Germany and Italy), 23 June 1939; Treaty of Prague (Germany and Hungary), 29 May 1940; Treaty of Craïova (Bulgaria and Romania), 7 September 1940; Accord of Kaunas, Riga Accord and Moscow Convention (Germany and USSR), all of 10 January 1941; Convention (Germany and Italy), 31 August 1941; Accord of Graz, 12 November 1941, and Accord of 30 September 1942 (Germany and Coatia); and Accord (Germany and Bulgaria), 22 January 1943.

98/ Conference at Potsdam, 2 August 1945.

99/ In support of its legality, see I. Brownlie, International Law and the Use of Force (Oxford, Clarendon Press, 1963), p. 408. For arguments against, see Alfred M. de Zayas, Nemesis at Potsdam: The Expulsion of the Germans from the East (Lincoln and London, University of Nebraska Press, 1989); "International law and mass population transfers", Harvard International Law Journal 16:2 (spring 1975), pp. 207-58; "The legality of mass population transfers: The German experience, 1945-1948", East European Qtrly. XII:1/2 (1978), pp. 1-23 and 144-60; and The German Expellees: Victims in War and Peace (New York, St. Martin's Press, 1993). The International Law Institute gathered opinions on the legality of the German transfers and most equivocated on the question of juridical legitimacy. See report and questionnaire presented by Giorgio Balladore Pallieri and subsequent responses in "Les transferts internationaux de populations" (quatrième commission), Annuaire vol. 44, No. 2 (1952), pp. 138-199.

100/ From the justification of transferring forced German labour to the Soviet Union on the basis of the legality of Allied post-war sovereignty over Germany, by John H.E. Fried, "Transfer of Civilian Manpower from Occupied Territory", American Journal of International Law, vol. 40, No. 2 (1946), pp. 303-331.

101/ By Treaty of 27 February 1946.

102/ 6 July 1945 and 10 July 1946, respectively. See De Zayas (1975), pp. 225-226.

103/ East and West Pakistan, today Pakistan and Bangladesh.

104/ 8 April 1950.

105/ De Zayas (1975), op. cit., pp. 249-250; International Commission of Jurists (ICJ), The Events in East Pakistan (Geneva, ICJ, 1971); Niall Macdermot, "Crimes against humanity in Bangladesh", ICJ Review, vol. 11 (1973), p. 29 and following; "Biafra, Bengal, and beyond: International responsibility and genocidal conflict", comment, Proceedings of the American Society of International Law (1972), 89 and following.

106/ British and Foreign State Papers, vol. 144, p. 1072.

107/ Louise W. Holborn, ed., War and Peace Aims of the United Nations: 1 September 1939 - 31 December 1942 (Boston, World Peace Foundation, 1943), p. 462.

108/ Article 6 (b) of the Charter of the International Military Tribunal; International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal (IMT), Nuremberg, 1945-1946, 42 vols. (London, H.M. Stationery Office, 1947-1949) vol. I, p. 11.

109/ Ibid.

110/ See General Assembly resolution 95 (1), adopted on 11 December 1946.

111/ IMT, vol. I, p. 63.

112/ For instance, F. de Menthon stated that persons recalcitrant to Nazification became victims of large-scale expulsions, IMT, vol. 5, p. 410; E. Faure declared that deportations and Germanization in France were "a criminal undertaking against humanity", IMT, vol. 6, p. 427; L.N. Smirnov dealt with the clearance of Polish inhabitants from their villages and their replacement by Baltic Germans, IMT, vol. 8, p. 256; also vol. 8, p. 253 and vol. 19, p. 469.

113/ Alfred M. de Zayas, "International law and mass population transfers", Harvard International Law Journal, vol. 16, No. 2 (1974), p. 214.

114/ Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949. See, generally, on the development of humanitarian law, Jean Pictet, Development and Principles of International Humanitarian Law (Dordrecht/Boston/London, Martinus Nijhoff Publishers/Henry Dunant Institute, 1985).

115/ Currently 122 States parties have ratified Protocol I and 113 have acceded to Protocol II.

116/ See Christopher Greenwood, "Customary law status of the 1977 Geneva Protocols" in Tanja Delissen, ed., Humanitarian Law of Armed Conflict: Challenges Ahead, Festschrift for Frits Kalshoven (Dordrecht, Netherlands, 1991), p. 113.

117/ Jean Pictet, ed., Commentary to the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva, International Committee of the Red Cross, 1958), p. 279.

118/ Adam Roberts and Richard Guelff, eds., Documents on the Laws of War (Oxford, Clarendon Press, 1982), pp. 55-57.

119/ The Lieber Code (Washington D.C., 24 April 1863) L. Friedman, ed., in The Law of War, a Documentary History, vol. I, (New York, Random House, 1972).

120/ IMT, vol. I, p. 44.

121/ At the ninth assembly of the League of Nations, 23 States accepted the terms of the agreement; Germany accepted in 1929.

122/ Michael Akehurst, A Modern Introduction to International Law, sixth edition (London, Routledge, 1992), p. 279.

123/ Claire Palley, "Population transfer and international law", paper presented at Unrepresented Nations and Peoples Organization (UNPO), international conference on "The Human Rights Dimensions of Population Transfer", Tallinn, Estonia, 11-13 January 1991, p. 13.

124/ According to Pictet, the intent behind the inclusion of this important prohibition becomes obvious: "It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions. The thought of the physical and mental suffering endured by these 'displaced persons' among whom were a great many women, children, old people and sick, can only lead to thankfulness for the prohibition embodied in this paragraph, which is intended to forbid such hateful practices for all time." Pictet, Commentary, op. cit., pp. 278-279.

125/ The commentary to paragraphs 2 and 3 indicates that the intention behind the exception clause is to protect the interest of the population concerned and to mitigate the unfortunate consequences of evacuation. Ibid., pp. 280-281.

126/ The commentary states that this clause was adopted "to prevent a practice adopted during the Second World War by certain Powers which transferred portions of their own population to occupied territory for

political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race." Ibid., p. 283.

127/ Scott Leckie, When Push Comes to Shove: Forced Evictions and International Law (The Hague, Netherlands, Ministry of Housing, Physical Planning and Environment, March 1992), p. 46.

128/ Theodor Meron, Human Rights and Humanitarian Norms as Customary Law (Oxford, Clarendon, 1991), p. 45.

129/ In footnote 131, Meron adds that "the object and purpose of Geneva Convention No. IV, a humanitarian instrument par excellence, was not only to protect civilian populations against Nazi-type atrocities, but to provide the broadest possible humanitarian protection for civilian victims of future wars and occupations, with their ever-changing circumstances". Ibid., pp. 48-49.

130/ Articles 146 and 147 of the Civilians Convention (1949); see also Pictet, Commentary, op. cit., pp. 582-602.

131/ Article 1, paragraph 4 of Additional Protocol I (1977).

132/ Y. Sandoz, C. Swinarski and B. Zimmerman, eds., ICRC Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Dordrecht/Boston/London, Martinus Nijhoff, 1987), p. 1000.

133/ See generally, on non-international armed conflicts, Georges Abi-Saab "Non-international armed conflicts" in International Dimensions of Humanitarian Law (Dordrecht/ Boston/ London, Henry Dunant Institute/UNESCO/Martinus Nijhoff Publishers, 1988), pp. 217-241.

134/ Sandoz, and others ICRC Commentary, op. cit.

135/ Ibid.

136/ Ibid., p. 1340; quoted in Meron, op. cit., p. 73.

137/ Greenwood, op. cit., p. 113.

138/ Adopted by the General Assembly in resolution 2391 on 26 November 1968, entered into force on 11 November 1970.

139/ For a detailed discussion of the Convention, see Robert H. Miller, "The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity", American Journal of International Law, vol. 65, No. 3 (July 1971), pp. 476-501.

140/ Inclusion of this particular inhuman act was strongly approved by many representatives "as covering some of the most evil crimes against humanity which were being committed at present". Ibid., p. 490.

141/ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968), article 1 (b).

142/ Reference is contained in the preamble to the Convention to General Assembly resolution 2184 (XXI) in which the Assembly condemned as a crime "the policy of the Government of Portugal, which violates the economic and political rights of the indigenous population by the settlement of foreign immigrants in the Territories".

143/ Claire Palley, "Population transfers", in Donna Gomein, ed., Broadening the Frontiers of Human rights: Essays in Honour of Asbjørn Eide (Oslo, Scandinavian University Press, 1993), p. 229.

144/ Ian Brownlie, Principles of Public International Law, fourth edition (Oxford, Clarendon, 1990), pp. 512-515, and the International Court of Justice (ICJ) judgment in the Barcelona Traction case. ICJ Reports (1970). The concept of jus cogens was accepted by the International Law Commission and incorporated in the Vienna Convention on the Law of Treaties, article 53. ILC Yearbook, 1963.

145/ For example, see Fujii v. State of California, 28 Cal. 2nd 718, 242 P. 2nd 617 (1952), International Law Reports 19 (1952), p. 312; Rice v. Sioux City Memorial Park Cemetery, Inc., 245 Iowa 147, 60 NW 2nd 110 (1953), International Law Reports 20 (1953), p. 244; Comacho v. Rogers, 199 F. Supplement 155 (1961); International Law Reports 32, p. 368.

146/ "The legal consequences for the States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970): Pleadings, oral statements, documents" [hereinafter, "Namibia Opinion"], ICJ Reports (1971), pp. 56-57.

147/ Articles 1 (3), 13 (1), 55, 56, 62 (2) and 76.

148/ Judge Tanaka, dissenting opinion, ICJ Reports (1966), p. 300; "Namibia Opinion", (1971), p. 57, para. 131.

149/ Barcelona Traction case (second phase), ICJ Reports (1970), p. 32.

150/ And zionism, until General Assembly resolution 3379 was revoked by General Assembly resolution 46/86 of 16 December 1991.

151/ ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation, 25 June 1958, entered into force 15 June 1960; UNESCO Convention against Discrimination in Education, 14 December 1960, entered into force 22 May 1962; UNESCO Protocol instituting a Conciliation and Good Offices Commission to be responsible for seeking a settlement of

any disputes which may arise between States Parties to the Convention against Discrimination in Education, 10 December 1962, entered into force 24 October 1968; International Convention on the Suppression and Punishment of the Crime of Apartheid, A/3068 (XXVIII), 30 November 1973; UNESCO Declaration on Race and Racial Prejudice, 27 November 1978; UNESCO Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War, 28 November 1978; and the International Convention against Apartheid in Sports, A/40/64, 10 December 1985.

152/ ILO Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 29 June 1951, entered into force 23 May 1953.

153/ General Assembly resolution 2263 (XXII) of 7 November 1967.

154/ A/36/55, 25 November 1981.

155/ E/CN.4/Sub.2/1992/37, pp. 15-19.

156/ As of 30 May 1993, 134 States had ratified the Convention.

157/ See Leckie, op. cit.

158/ See, for example, Sachar, op cit.

159/ For example, see United Nations Legislative Series, Laws concerning Nationality (1954), pp. 586-593. The Treaties of St. Germain refer to persons born of parents "habitually resident or possessing rights of citizenship (pertinenza)". See also article 19 of the Italian Peace Treaty, 10 February 1947, cited in Brownlie, Principles of International Law, op. cit., 560. This relates also to the emerging concept of the right to the homeland (Recht auf die Heimat), as elaborated in Kurt Rabl, ed., Das Recht auf die Heimat, vols. 1-5 (Munich, 1959); Otto Kimminich, Das Recht auf die Heimat (Bonn, 1978); F.H.E.W. du Buy, Das Recht auf die Heimat (Utrecht, 1975); Hartmut Koschyk, ed., Das Recht auf die Heimat. Ein Menschenrecht (Munich, 1992); Christian Tomuschat, "Das Recht auf die Heimat: Neue rechtliche Aspekte", in J. Jekewitz, ed., Das Menschenrecht zwischen Freiheit und Verantwortung, Festschrift for Karl Josef Partsch (Berlin, 1989), pp. 183-212; and Felix Ermacora, Die sudetendeutschen Fragen. Rechtsgutachten (Munich, 1992).

160/ James Crawford, The Creation of States in International Law (Oxford, Clarendon, Oxford, 1979), pp. 85-102; also David Makinson, "Rights of peoples: A logician's point of view", in James Crawford, ed., The Rights of Peoples (Oxford, Clarendon, 1988), p. 73: "the right to self-determination is still the only right of peoples to be incorporated explicitly and separately into an international instrument under the aegis of the United Nations".

161/ "Self-determination is not a right to be enjoyed once and thereafter to be forever lost", stated in a UNESCO statement to the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, E/CN.4/Sub.2/1992/6, para. 3 (d). Hector Gros Espiell holds that "the right of peoples to self-determination has lasting force, does not lapse upon first having been exercised". See his "The right of self-determination: implemention of United Nations resolutions", E/CN.4/Sub.2/405/Rev.1 (1980), para. 47.

162/ Contemporary views maintain that self-determination is not confined to a right to be enjoyed by formerly colonized peoples. See E/CN.4/Sub.2/1992/6, para. 3 (d). Rodolfo Stavenhagen argues that applying a geographical criterion as the old "salt-water" principle to determine which peoples have the right to self-determination is a reductio ad absurdum of the whole question. See his The Ethnic Question: Conflicts, Development and Human Rights (Tokyo, United Nations University Press, 1990), pp. 65-75. General Comment No. 12 of the Human Rights Committee, as quoted in Patrick Thornberry, "The democratic or internal aspect of self-determination with some remarks on federalism" suggests that there exists "an ongoing right of self-determination of general application which includes the peoples of independent States", CCPR/C/21/Add.3, p. 8. James Crawford argues self-determination is to be thought of as a right of peoples, rather than governments. See his "The rights of peoples: 'Peoples' or Governments?" in The Rights of Peoples, op. cit., p. 59. For the distinction between a general rinciple of self-determination and its appearance in internationally recognized rights, see Hurst Hannum Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights (Philadelphia, University of Pennsylvania Press, 1990), pp. 27-49.

163/ Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 of 14 December 1960, Official Records of the General Assembly, Fifteenth session, Supplement No. 16, A/4684; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, article 1; International Covenant on Civil and Political Rights, 19 December 1966, article 1; of the United Nations Charter, article 1, para. 2 and article 55.

164/ M. Pomerance Self-determination in Law and Practice : The New Doctrine in the United Nations (Dordrecht/Boston/London, Martinus Nijhoff, 1982).

165/ Cindy Cohn, "Choices from the bundle: A model for exercising the right to self-determination" [forthcoming 1993].

166/ Ian Brownlie, "The Rights of Peoples in Modern International Law", in Crawford, The Rights of People, op. cit., p. 16.

167/ Alfred de Zayas, "Population expulsion and transfer", in Rudolf Bernhardt, Encyclopedia of Public International Law, vol. 8, (Amsterdam/New York/Oxford, North Holland, 1985), pp. 438-444; Daniel Thurer "Self-determination", ibid., pp. 470-476; Antonio Cassese, "The

self-determination of peoples", in Louis Henkin, ed., The International Bill of Rights: The Covenant on Civil and Political Rights (New York, Columbia University Press, 1981).

168/ Christa Meindersma, "Introduction" (adapted from a paper presented at the international conference of the Unrepresented Nations and Peoples Organization [UNPO] on "the Human Rights Dimensions of Population Transfer", Tallinn, Estonia, 11-13 January 1992), in David Goldberg, ed., Report on the UNPO Conference on Population Transfer [hereinafter, UNPO Conference Report] (The Hague, UNPO, 1992). Claire Palley states that "once broad issues surrounding population transfers are canvassed, a possible development is the growth of law which sanctions violations of the right of internal self-determination, including attacks on the continuing identity and integrity of culturally distinct ethnic groups through suppressing their culture". See her "Population transfers", in Gomein, op cit., p. 222. See also Thornberry, op. cit., p. 21. He says that "the integrity of the whole is disturbed by policies of forced resettlement, population transfer, mass expulsions, and other forms of demographic manipulation. These should be seen as violations of self-determination".

169/ Palley, op. cit., p. 222. See also note 160 above.

170/ Report of the Sub-Commission rapporteur on self-determination Hector Gros Espiell "The right to self-determination: Implementation of United Nations resolutions", E/CN.4/Sub.2/405/Rev.1 (1980), para. 65. See also ICJ Opinion in the Western Sahara case, ICJ Reports (1975), p. 31 and 33.

171/ Michael Kirby, "Population Transfer and the Right to Self-Determination: Differences and Agreements" (paper presented at UNPO Conference referred to in note 126 above. Kirby contends that, "in a situation where a settler population has become a majority, automatic exercise of democratic rights by that majority may invite the "take-over" of the territory, achieving by the ballot box what they had failed to achieve by armed annexation. Democracy, so defined could lead to the extinguishment of a precious individual culture" (p. 70).

172/ For example, see Turkish Law No. 2510, 14 June 1934, especially para. 11.

173/ General Assembly resolution 260 (III), 9 December 1948, entered into force 12 January 1951. See Paul Sieghart, The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights (New York, Oxford University Press, 1985), pp. 60-61; also Igor P. Blischenko, "Responsibility in breaches of humanitarian law", in International Dimensions of Humanitarian Law (Paris, UNESCO; Geneva: Henry Dunant Institute; Dordrecht: Martinus Nijhoff, 1988), pp. 285-286.

174/ Reservations to the Convention on Genocide, Advisory Opinion, ICJ Reports (1951)

175/ Mass Deportations of Population from the Soviet Occupied Baltic States (Stockholm, Estonian Information Center and Latvian National Foundation, 1981).

176/ Yoram Dinstein, "Collective human rights of peoples and minorities", International and Comparative Law Quarterly, vol. 25, Part 1 (January 1976), p. 105.

177/ Joseph Schechla, "Planning the end of existence", Middle East Policy, vol. 1, No. 2 (Summer 1992), pp. 109-119. The author points out that physical destruction of a group does not have to be rapid, it could be a gradual and incremental process.

178/ IMT states that "crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced", Federal Rules Decisions, vol. 6 (St. Paul, West Publishing Co., 1947), p. 110.

179/ General Assembly resolution 217 (III), Part A.

180/ See "The Universal Declaration of Human Rights: its significance in 1988", SIM Special No. 9 (Utrecht: SIM, 1988); Brownlie Principles of Public International Law, op. cit., pp. 570-71.

181/ Concerning the legal significance of the Universal Declaration with regard to the 1503 Procedure, see Asbjørn Eide, Gudmundur Alfredsson and others, eds., The Universal Declaration on Human Rights: A Commentary (Oslo, Scandinavian University Press, 1992), pp. 6-8.

182/ Cees Flinterman, "The Universal Declaration of Human Rights and the need for human rights education", in SIM Special No. 9, op. cit., in which he states that "all States are now accountable and responsible for the ways in which they comply with this common standard", (p. 41).

183/ Jan Martenson, "The Preamble of the Universal Declaration of Human Rights and the United Nations Human Rights Programme", in Eide and Alfredsson, op. cit., 17-29. He expresses the view that "the UDHR marked its time as a statement of the ultimate value of the human person in refutation of the Fascist and Nazi theories, which lay at the basis of so many barbarous acts, as a justification for the suffering and sacrifices that went into the struggle against those regimes and as a programme of action to prevent a renewal of the horrors all too present in the minds of the UDHR drafters", (p. 17).

184/ General Assembly resolution 2200 A (XXI) on 16 December 1966, entered into force on 23 March 1976.

185/ On post-Second World War transfers of ethnic Germans, see Alfred de Zayas, Nemesis at Potsdam, op. cit.; and "International Law and Mass Population Transfers", Harvard Intl L. J. vol. 16, No. 2, pp. 207-258.

186/ The right to freedom of movement is contained elsewhere in human rights instruments: Universal Declaration, article 13; European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol IV, articles 2 and 3; Inter-American Convention on Human Rights, article 22; Racism Convention, article 5; African Charter on Human and Peoples' Rights, article 12.

187/ On exile and expulsion in connection with the right to freedom of movement, see Hurst Hannum, The Right to Leave and Return in International Law and Practice (Dordrecht/Boston/London, Martinus Nijhoff, 1987), pp. 63-67.

188/ Ibid., p. 94.

189/ Report of the Special Rapporteur, Ms. Erica Daes, "The individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration", E/CN.4/Sub.2/432/Rev.2 (1982).

190/ International Covenant on Civil and Political Rights, articles 17 and 23.

191/ See the report of the Special Rapporteur on economic, social and cultural rights, Danilo Türk, op. cit., E/CN.4/Sub.2/1992/16. General Assembly resolution 32/130 "Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms", 16 December 1977 states, inter alia, that "all human rights and fundamental freedoms are indivisible and interdependent" and "the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible".

192/ The Limburg Principles, established at an expert meeting to consider the nature and scope of the obligations of States Parties to the International Covenant on Economic Social and Cultural Rights convened by the International Commission of Jurists, Maastricht, June 1984. For an analysis of the symposium, see Human Rights Quarterly, vol. 9, No. 2 (May 1987).

193/ See also, Limburg Principles Nos. 70-73. Principle 72 details behaviour of Governments which amounts to a violation of the Covenant.

194/ Generally, on the right to adequate housing, see Scott Leckie, From Housing Needs to Housing Rights: An Analysis of the Right to Adequate Housing under International Human Rights Law (London, IIED, 1992); also Rajindar Sachar, E/CN.4/Sub.2/1992/15.

195/ In its resolutions 1991/12 and 1992/14 the Sub-Commission recognized that "practices of forced eviction constitute a gross violation of human rights, in particular the right to adequate housing".

196/ Report of the sixth session of the Committee on Economic, Social and Cultural Rights Official Records of the Economic and Social Council, 1992, Supplement No. 3, (E/1992/23; E/C.12/1991/14), annex III, para. 7.

197/ Committee on Economic, Social and Cultural Rights, General Comment No. 4 (1991), 12 December 1991: "The Right to Adequate Housing", on article 11 of the Covenant.

198/ Jack Donelly, "Human rights, individual rights and collective rights", in Jan Berting and others, eds., Human Rights in a Pluralist World: Individuals and Collectives (Westport, Meckler, 1990), pp. 39-74.

199/ See Limburg Principles 46-57. "Limitations of the rights recognized in the Covenant must be for and in the interest of society as a whole" (principle 52) and "provisions permitting limitations should not be applied in a manner that renders the right nugatory" (principle 42).

200/ E/CN.4/1992/23, para. 86.

201/ Adopted 10 June 1930, entered into force 1 May 1932.

202/ As of 31 December 1992, ILO Convention No. 29 had been ratified by 129 States. ILO, "Lists of Ratifications by Convention and by country, International Labour Conference, 79th Session" (Geneva, International Labour Office, 1992), pp. 14-16.

203/ ILO, "Meeting of Experts on the Revision of the Indigenous and Tribal Population Convention, 1957 (No. 107)", APPL/MER/107/1986/D.7.

204/ Ibid.

205/ Many indigenous peoples have rejected article 16 for "allowing for the continued dispossession of indigenous peoples from their land to make way for State-sponsored and State-approved development". Sharon Venne, "The new language of assimilation: a brief analysis of ILO Convention 169", in Without Prejudice, vol. II, No. 2 (1989), p. 63.

206/ Ibid.

207/ Caroline Whitesinger, quoted in Anita Parlow, "Cry Sacred Ground: Big Mountain, U.S.A.", Without Prejudice vol. II, No. 1 (1988), p. 15.

208/ On the inadequacy of monetary compensation, as such, see World Bank, "Social issues associated with involuntary settlement in bank-financed projects", Operational Manual Statement 2.33 (February 1980), para. 19.

209/ Adopted on 30 August 1961 pursuant to General Assembly resolution 896 (IX) of 4 December 1954; entered into force on 13 December 1975.

210/ Adopted 28 September 1954 by a Conference of Plenipotentiaries convened by ECOSOC in resolution 526 A (XVII) of 26 April 1954; entered into force on 6 June 1960.

211/ See also Alfred Verdoss and Bruno Simma, eds., Universelles Völkerrecht: Theorie und Praxis (Berlin: Duncker & Humboldt, 1977), p. 585.

212/ General Assembly resolution 3068 (XXVIII), 30 November 1973, entered into force 18 July 1976.

213/ A/RES/S-16/1, adopted by General Assembly consensus, 14 December 1989.

214/ Signed at Geneva on 25 September 1926; entered into force on 9 March 1927.

215/ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practice Similar to Slavery; signed at Geneva on 30 April 1956; entered into force on 30 April 1957.

216/ Slavery is widely acknowledged to be the first violation considered under the principle of jus cogens. See, inter alia, Report of the International Law Commission on its eighteenth session Official Record of the General Assembly, Supplement 9, p. 1; also Karen Parker, ed., Compensation for Japan's World War II Victims (International Educational Development, 1993), p. 19.

217/ Ibid. The Parker study has been submitted to the Subcommission's Working Group on Slavery and Slavery-like Practices.

218/ General Assembly resolution 45/158 of 25 February 1991, annex.

219/ For a discussion of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, see Shirley Hume and Jan Niessen, "The first Uninted Nations convention on migrant workers", in Netherlands Quarterly of Human Rights, vol. 9, No. 2, pp. 130-142.

220/ Articles 14 and 15.

221/ Article 22 elaborates on the elements of due process in the case of expulsions and provides, inter alia, for judicial review, the right to earned wages and other entitlements and the right to seek compensation and re-entry if her/his expulsion becomes annulled after the expulsion has been executed.

222/ Cases 6780/74 and 6950/75, (Cyprus v. Turkey). "Opinion of the Commission, 10 July 1976", European Human Rights Reports - Report of the Commission, vol, 4, section 208-10, pp. 72-74.

223/ Guy S. Goodwin-Gill notes in general that "mass expulsions, however, is inherently suspect. In almost every case, xenophobia will be an element and often the very foundation of measures, which, in the suddenness of their application, will disregard presumptively the individualization of basic human rights which is required by existing instruments and the provisions of

general international law". "Mass expulsion: Comment", Yearbook of the Institute of Humanitarian Law (San Remo, International Institute of Humanitarian Law, 1984), p. 95.

224/ Relevant in this context is the work of the UNESCO Meeting of Experts on Further Study of the Rights of Peoples (Paris, February 1990) to define what constitutes a "people". They concluded that the following characteristics of a people are referred to: "A people for the rights of peoples in international law, including the right to self-determination, has the following characteristics: (1) A group of individual human beings who enjoy some or all of the following common features: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, common economic life; (2) The group must be of a certain number who need not be large, but must be more than a mere association of individuals within a State; (3) The group as a whole must have the will to be identified as a people or the consciousness of being a people, allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness; (4) Possibly the group must have institutions or other means of expressing its common characteristics and will for identity".

225/ Adopted on 11 September 1969.

226/ OEA/Ser.L/V/II.23 doc. rev. 2, adopted on 22 November 1969, entered into force on 18 July 1978; OAS Treaty Series No. 36, p. 1.

227/ Article 11 contains one of the more detailed versions of the right to privacy. It states that (1) Everyone has the right to have his honour respected and his dignity recognized; (2) No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation; (3) Everyone has the right to the protection of the law against such interference or attacks. It would be hard to argue that under these terms, population transfers would not constitute disrespect for human dignity and abusive interference with one's private life and home.

228/ General Assembly resolution 2625 (XXV), 24 October 1970.

229/ Douglas Hurd, "The Middle East: lessons to be learnt from the Gulf War", The House, 29 April 1991, cited in Roberta Cohen, "Human Rights Protection for Internally Displaced Persons" (Washington, Refugee Policy Group, June 1991), p. 19.

230/ Türk, op. cit., p. 28.

231/ The Urban Edge, op. cit., p. 2.

232/ General Assembly resolution 3384 (XXX) of 10 November 1975.

233/ Ibid., fifth preambular paragraph.

234/ General Assembly resolution 41/128 of 4 December 1986.

235/ E/CN.4/1993/16.

236/ Eighth preambular paragraph.

237/ E/CN.4/1987/17. See also Human Rights Quarterly vol. 9, No. 2 (1987); and UNDP Human Development Report 1991 (Oxford and London, Oxford University Press, 1987), pp. 2, and 24.

238/ E/CN.4/1990/9/Rev.1, para. 157.

239/ Ibid., para. 190.

240/ Report of the Secretary-General: "Question of the Realization of the Right to Development: Concrete proposals for the effective implementation and promotion of the Declaration on the Right to Development", E/CN.4/1993/16, p. 4.

241/ Committee on Economic, Social and Cultural Rights resolution 1989/13.

242/ E/C.12/1990/CAP.2/Add.2, p. 7.

243/ Unless the State's legal provisions regarding naturalization, nationality or citizenship discriminate against any particular nationality (1.3).

244/ General Assembly resolution 40/144 of 13 December 1985.

245/ See Yearbook of the International Law Commission (1953), pp. 180-181, 186, 218, 237, 239.

246/ Adopted on 30 August 1961 by The Conference of Plenipotentiaries which met in 1959 and 1961 pursuant to General Assembly resolution 896 (IX); entered into force on 13 December 1975.

247/ Baron von Freitag-Loringhoven, "Politics and right", in Europäische Revue (January 1941); cited in Schechtmann, op. cit., p. 370.

248/ See, for example, letter of United States Assistant Secretary of State Phillip Talbot to the American Council for Judaism's Executive Vice-President Rabbi Elmer Berger, affirming that the United States "does not regard [Israel's extraterritorial] 'Jewish people' concept as a concept of international law". Reprinted in W. Thomas Mallison, Jr., "The Zionist-Israel juridical claims to constitute the 'Jewish people' entity and to confer membership in it: appraisal in public international law", in The George Washington Law Review, vol. 32, No. 5 (1964), p. 1075.

249/ General Assembly resolution 177 (II) of 21 November 1947.

250/ Report of the International Law Commission on its forty-third session, 1991, Official Records of the General Assembly, Supplement No. 10 (A/46/10).

251/ Ibid., p. 268.

252/ Ibid., p. 271.

253/ Draft code, article 5. The ILC Commentary explains that "the State may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime. It could be obliged to make reparation for injury caused by its agents". ILC report, 1991, op. cit., p. 255.

254/ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Abo Akademi University, Turku, Finland, 30 November-2 December 1990, submitted as a working paper to the Sub-Commission, at its forty-third session, E/CN.4/Sub.2/1991/55.

255/ Ibid. See also article 3 (2) (a) and (b) on humane treatment of persons, which prohibits in particular "violence to life, health and physical and mental well-being of persons ... and other outrages upon personal dignity" and "collective punishments against persons and their property".

256/ The latest report is contained in document E/CN.4/453.

257/ A fuller treatment of the possible impact of the draft articles on State responsibility on the issue of population transfer will be made in the progress report.

258/ Draft articles, article 3.

259/ Draft articles, Part I, article 19.

260/ Draft articles, Part II, article 14 (2) (a) and (b).

261/ David J. Harris, Cases and Materials on International Law, fourth edition (London, Sweet and Maxwell, 1991), p. 460.

262/ E/CN.4/Sub.2/1992/28.

263/ World Bank, "Tribal people in World Bank-financed projects" Operational Manual Statement 2.34.

264/ Ibid., p. 27.

265/ Ibid.

266/ Operational Manual Statement No. 2.33 (February 1980).

267/ All quoted from Operational Policy Statement No. 2.33.

268/ Operational Manual Statement No. 2.34 (February 1982).

269/ "Involuntary Resettlement", Operational Directive 4.30 (29 June 1990).

270/ "Les transferts internationaux de populations" (quatrième commission), report and questionnaire by Giorgio Balladore Pallieri, responses by Baron F.M. van Asbeck, Max Huber, Herbert Kraus, Henri Rolin, Georges Scelle, Walter Schätzel, J. Spiropoulous, Alfred Verdross, Fernand De Visscher and Bohdan Winiarski, Annuaire, vol. 44, No. 2 (1952), pp. 138-199.

271/ Ibid., J. Spiropoulous, pp. 185-186.

272/ Ibid., Alfred Verdross, pp. 186-187.

273/ Ibid., Spiropoulous, p. 186.

274/ Ibid., Herbert Kraus establishes a hierarchy of three categories of rights involved: human rights, rights of individual States and common rights of States (Menschenrechte, einzelstaatliche Rechte u. gemeinschaftliche Rechte), pp. 170-171.

275/ Ibid., F.M. van Asbeck, p. 162.

276/ Ibid., Kraus, p. 173.

277/ Ibid., G. Scelle, p. 180.

278/ Ibid., p. 178.

279/ Ibid., B. Winiarski, pp. 190-191.

280/ Ibid., W. Schätzel, p. 184.

281/ Affirmed, as asserted by Scelle, op. cit., in article 38 of the Statute of the ICJ.

282/ Speaking on point two of his Fourteen Points before the United States Congress, 11 February 1918.

283/ See "Les transferts de population internationaux," op. cit.: F.M. van Asbeck, p. 160; W. Schätzel, p. 184; and F. De Visscher, p. 189-90.

284/ Willem Riphagen, Special Rapporteur, "Fifth report on the content, forms and degrees of State responsibility: Part two of the draft articles", A/CN.4/380, 4 April 1984, article 14 (2).

285/ Declaration of Principles of International Law on Mass Expulsion, in Report of the Sixty-second Conference of the International Law Association, Seoul, 24-30 August 1986 (London, International Law Association, 1986).

286/ Foreign Broadcast Information Service, 15 November 1989: LD1411174689, citing Tass International Service (Moscow), 14 November 1989, 16:45 GMT [in Russian]. Text reprinted in Izvestia, 24 November 1989, p. 1.

287/ Vasily Kononenko, "Outcome of Moscow meeting of CIS heads of State inspires moderate optimism" [in Russian], Izvestia 7 July 1992, pp.1-2.

288/ RFE/RL Research Report weekly review (22 July-4 August 1992), p.71.

289/ See Pallieri, op. cit., 140-41.

290/ See, for example, International Labour Organisation Conventions 107 and 159 concerning the sanction of population transfers for purposes of "national development", and especially the effective denial in article 1 of Convention 159 of the applicability of the universal principle of self-determination to indigenous and tribal peoples.

291/ Paper delivered at human rights conference on "The Problem of Demographic Manipulation in International Law", Nicosia, 21 May 1990, p.8.

292/ Report of the International Law Commission on the work of its forty-second session, 1991. Official Records of the General Assembly, forty-second session, Supplement No. 10 (A/45/10); forty-third session, 1992, (A/46/10); and forty-fourth session, 1993 (A/47/10).

293/ Op. cit. A/46/10, p.325.

294/ Ibid.,pp. 331-332. For discussion of the right of adopting reprisals as limited by humanitarian concerns, see Flavia Lattanzi, Garanzie dei diritto dell'uomo nel diritto internazionale generale (Milan, Giuffre, 1983), pp.295-302.